

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

EUGENE PRESTON BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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1 In United States District Court, Northern District
of Georgia, Atlanta Division

Habeas Corpus No. 2320

EUGENE PRESTON BROWN, PETITIONER

vs.

WILLIAM H. HIATT, WARDEN, U. S. PENITENTIARY, ATLANTA,
GEORGIA, RESPONDENT

Petition for writ of habeas corpus

Filed July 16, 1948

To the Honorable E. MARVIN UNDERWOOD, judge of said Court:

The petition of Eugene Preston Brown respectfully shows:

1. He is a citizen of the United States, and a resident of the State of North Carolina.

2. He is illegally restrained of his liberty by being confined in the United States penitentiary at Atlanta, in this judicial district.

3. The person restraining the liberty of petitioner is William H. Hiatt, Warden for said penitentiary, who resides at said penitentiary in said district.

2 4. The cause or pretense of this restraint is a pretended conviction for murder and sentence therefor, by a general court martial and a commitment issued thereunder. The original sentence was to be dishonorably discharged, to forfeit pay and allowances and to be confined at hard labor for the term of his natural life. The imprisonment for life has been changed to imprisonment for 20 years.

5. The conviction or finding of guilt, the sentence and commitment issued thereunder are void, by reason of the facts stated in this petition.

6. Brown, the petitioner, Technician Fifth Grade, on active service in the Army of the United States, was on guard duty about 8:15 P. M. on December 25, 1946, at or near Feuerbach, Germany. Brown was at the guard box of a Motor Pool of the Army of the United States.

7. He was the only guard then on duty at that Motor Pool.

8. A German girl named Elisabeth Rehm was visiting Brown at the guard box. He believes that she was of good character and reputation.

9. Among the guard details for the Motor Pool there were several Polish citizens, and they were in the employ of the Army of the United States or the War Department.

3 10. One of these Polish guards was Sergeant Franz Olschewski, of Labor Supervision Company 1010; another was Josef Kowalsczyk, Private First Class, Polish Guard of the 4222 Labor Supervision Company (under the 1010 Labor Supervision Co.).

11. Sergeant Olschewski and Private Kowalsczyk entered the guard box about 8:15 P. M., December 25, 1946. Neither of them was then on duty or going on duty, and neither was entering the guard box upon official business. One or both of them spoke to Elisabeth Rehm in a foreign language, speaking words that Brown did not understand. One of them seized her shoulder. Brown ordered Sergeant Olschewski and Private Kowalsczyk to leave. They spoke loudly in a foreign tongue, and one of them struck Brown in the face with his fist. Brown again ordered them out. They turned, and when just outside of the guard box they stopped and turned around. Brown, picking up a Colt .45 automatic pistol, followed them to the door. There Kowalsczyk attacked Brown with a whiskey bottle, three-quarters of a litre or a litre in size. They fought in the following manner, these facts occurring in rapid succession. Kowalsczyk, standing outside of the door, with his right hand swung the whiskey bottle at the head of Brown. Brown dodged. Kowalsczyk swung the bottle at Brown's head a second time. Then Brown pulled back the slide on the .45 calibre pistol to place a cartridge in the chamber. When Brown did this, Sergeant Olschewski turned and ran away and did not see the rest of the fight. Kowalsczyk remained where he was, swinging the litre bottle a third time at the head of

4 Brown. Then Brown shot Kowalsczyk without aiming, intending to frighten him away from the attack, but the bullet entered the right shoulder. Only one shot was fired. From this wound, death resulted later.

12. Brown was 5 feet 7 $\frac{1}{4}$ inches tall; his weight with clothing, 135 pounds; his age, 39.

13. Sergeant Olschewski and Private Kowalsczyk were larger and younger men.

14. Brown was under military orders to keep the Polish guards out of the guard box when they were not on duty.

15. Brown was a soldier on guard duty alone. In his judgment, it was his duty to fire the shot, and to fire it in the manner that he did.

16. Brown entered the service in 1940. He was honorably discharged September 6, 1945, after combat service. He enlisted in the Regular Army November 17, 1945.

17. A few minutes after the fight, Brown was taken into custody. He has been in custody ever since.

18. On the night of December 25, 1946, Elisabeth Rehm
5 was interviewed at Stuttgart, Germany, within five miles of
Feuerbach. Her statement was typed or written down and
consisted of 15 typewritten lines.

19. On December 26, 1946, a statement 10 lines in length was
signed at Stuttgart by Private Richard F. Stone, who did not
see the fight but heard the shot and came running to the scene.

20. On December 26, 1946, a statement 9 lines in length was
signed by Private First Class Carl A. Oaks, who did not witness
the fight but heard the shot and came running.

21. On December 27, 1946, at Company Headquarters at Esslin-
gen, Germany about 10 miles from Stuttgart, a charge alleging
violation of the 93rd Article of War and a specification alleging
manslaughter were instituted against Technician Fifth Grade
Eugene P. Brown. (The 93rd Article of War lists various crimes,
including manslaughter, and including other crimes not material
in this case).

22. On December 27, 1946, at Battalion Headquarters in Ger-
many, an Investigating Officer was appointed to investigate the
charges and he was directed to conduct the investigation in con-
formity with Paragraph 35a of the Manual of Courts-Martial.

23. On December 27, 1946, the Investigating Officer completed
the report of his investigation and transmitted it to
6 the Battalion Commanding Officer. His report consisted
of the following papers:

- #1. Court Martial Charge Sheets in triplicate.
- #2. Statement of Elisabeth Rehm in triplicate.
- #3. Statement of Private Richard E. Stone in triplicate.
- #4. Statement of Private First Class Carl A. Oaks in triplicate.
- #5. Statement of Sergeant Franz Olschewski in triplicate (This
statement was undated, 22 lines in German, 18 lines in the English
translation).
- #6. Statement of Captain Robert J. Brimi in triplicate (Au-
topsy report, 25 lines long).
- #7. Record of Previous Convictions in triplicate.
- #8. Report of Pretrial Investigation in triplicate.
- #9. Sworn Statement of T/5 Eugene P. Brown in triplicate
(Undated, 39 lines in length).

The Report of Pretrial Investigation was upon a printed form.
The only facts about the case contained in it were a list of witnesses,
Stone, Oaks, Olschewski and Miss Rehm, and the name of the
pathologist.

24. On December 27, 1946, the Battalion Commanding Officer
transmitted the report of Pretrial Investigation and the other

papers listed in paragraph 23 of this complaint to the Commanding Officer of the 60th Ordnance Group.

25. On December 28, 1946, Group Headquarters transmitted all these papers to the Commanding General of the

7 Continental Base Section at Bad Nauheim, Germany, about 110 miles from Feuerbach.

26. On December 30, 1946, at Continental Base Headquarters, the charge alleging violation of the 93rd Article of War and the specification of manslaughter were marked out, and a charge alleging violation of the 92nd Article of War and a specification alleging murder were instituted against Technician Fifth Grade Eugene P. Brown (The 92nd Article of War lists murder, and lists also other crimes not relevant to this case).

27. In regard to this charge of violation of the 92nd Article of War and this specification alleging murder, there was never an appointment of an Investigating Officer, nor was there a Pretrial Investigation or Pretrial Report of Investigation.

28. Nor was any Investigating Officer appointed on or after December 30, 1946, nor did any Investigating Officer conduct any investigation or prepare or submit a Report of Pretrial Investigation on or after December 30, 1946, in regard to Eugene P. Brown.

29. Before a General Court-Martial has jurisdiction for the trial of a charge or a specification, it is an indispensable requirement of law that there shall be a pretrial investigation and report in regard to the charge and the specification. A trial without

8 such prerequisite is totally void. Therefore, in this case

the trial of Brown was void, and the conviction, sentence and commitment are void. One reason why an appropriate Pretrial Investigation and report are indispensable prerequisites to the jurisdiction of a General Court-Martial is that the accused is confined and therefore handicapped in preparing his case. Also, the necessity for speed in dispensing military justice makes it necessary to furnish an adequate Investigation Report to Defense Counsel before the trial, to assist him in the defense. The system of military justice contemplates compliance with these requirements before trial.

30. In regard to the purported investigation on December 27, 1946, of the charge alleging violation of the 93rd Article of War and of the specification alleging manslaughter, which charge and specification were on December 30, 1946, marked out at Continental Base Headquarters, such investigation as was conducted on December 27, 1946, even if it be deemed to include whatever investigation had been made and reported on December 25 and 26 prior to the appointment of the Investigating Officer, - - all such in-

vestigations are to be hereinafter referred to as the pretrial investigation, and all of them combined were insufficient to amount to the investigation required by the 70th Article of War and Section 35a of the Manual of Courts-Martial, with reference to either manslaughter or murder.

31. In the pretrial investigation, there was no investigation of the litre whiskey bottle for finger prints of Kowalsczyk, or to determine where it came from, or whether Sergeant Olschewski or Private Kowalsczyk, or both, had been drinking from it.

9 32. In the pretrial investigation, there was no investigation as to whether Sergeant Olschewski or Private Kowalsczyk had been drinking alcoholic beverages from any other source.

33. In the pretrial investigation, in the autopsy of Kowalsczyk, there was no report in regard to whether or not he had been drinking alcoholic beverages.

34. In the pretrial investigation, there was no investigation as to whether Sergeant Olschewski or Private Kowalsczyk was violent and quarrelsome in disposition.

35. In the pretrial investigation, there was no investigation as to whether or not the Polish guards at the Motor Pool were violent, quarrelsome, and difficult to handle.

36. In the pretrial investigation, there was no investigation of the veracity or character of Sergeant Olschewski, who testified that he saw the shot fired, and who was the only witness who so testified except, of course, the accused.

37. In the pretrial investigation, there was no investigation of the clothing of Private Kowalsczyk to determine whether the shot was fired from a short distance.

10 38. In the pretrial investigation, there was no adequate pretrial investigation of the purpose which caused Sergeant Olschewski and Private Kowalsczyk to enter the guard box.

39. In the pretrial investigation, there was no adequate investigation of the occurrences inside the guard box before the shot was fired.

40. In the pretrial investigation, there was no interrogation of several of those who came to the scene after the shot was fired.

41. In the pretrial investigation, there was no interrogation by the Investigating Officer of the Military Police called to the scene, or the police who took Eugene Brown into custody, or the police who took Sergeant Olschewski and Elisabeth Rehm into custody.

42. In the pretrial investigation, the interrogation of Sergeant Franz Olschewski was conducted first through a Russian interpreter who did not understand German adequately. That interpreter did not correctly translate the interrogation. It is the one contained in the pretrial investigation.

43. On December 27, 1946, a subsequent interrogation of Sergeant Franz Olschewski was conducted through another interpreter. No report of this interview is contained in the Report of Pretrial Investigation.

44. Defense Counsel were not furnished with a copy of the second interview with Sergeant Olschewski. This is stated upon information and belief.

45. In the pretrial investigation, the interrogations of all witnesses contained in the investigation report were altogether inadequate for a charge or specification of manslaughter or murder.

46. In the pretrial investigation, there was no investigation of what orders had been issued to the Polish guards with reference to entering the guard box when not on duty.

47. At the trial by General Court Martial, the facts mentioned in paragraphs 32, 33, 34, 35, 36, 37, 40, 41, and 44 were not inquired into by the prosecution, the defense, or the Court.

48. Before the trial, no witness was examined in the presence of Brown.

49. Two of the principal prosecution witnesses, Sergeant Olschewski and Elisabeth Rehm, were interrogated in the investigation and testified at the trial in German. Neither spoke English to any extent.

50. Defense Counsel appointed for the defense of Brown was his only counsel.

51. Defense Counsel did not speak German or Polish.

52. Lack of knowledge of these languages was a prejudicial handicap.

52A. Brown is not a lawyer.

52B. The able Officer who was Defense Counsel spent about 10 minutes interviewing Brown before the trial and in the interview did not question Brown about the facts but merely told him when and where the trial would be held. This fact indicates, and it is therefore alleged upon information and belief, that Defense Counsel was not a lawyer and was not skilled in criminal investigation.

52C. Two able lawyers, members of the Judge Advocate General's Department, represented the prosecution.

52D. In a homicide case, there was a duty to appoint Assistant Defense Counsel and to include skilled and experienced lawyers among the counsel for the defense, if they were available.

53. Upon information and belief, Brown alleges that officers qualified to be defense counsel and having a knowledge of German and Polish were available for appointment to be included among defense counsel.

53A. By reasons of the facts stated in paragraphs 49, 50, 51, 52, 52A, 52B, 52C, 52D, and 53 of this petition, Brown was

13 denied the right of counsel provided in the Sixth Amendment to the Constitution of the United States.

54. The interpreter who served at the court martial was an enemy alien, and, therefore, the conviction and finding are void. This is particularly important because neither Brown nor his counsel understood German or Polish.

55. Brown believes and has good reason to believe, and charges that qualified interpreters in the Army of the United States were then and there readily available for both the Polish and the German languages.

56. All the evidence at the trial construed most strongly in favor of the prosecution, shows no proof whatever of malice or premeditation, and does not show adequate proof of the crime of manslaughter to convince beyond a reasonable doubt.

57. The General Court Martial that tried Brown had no jurisdiction. It was appointed December 7, 1946. The record contains only an extract from that order December 7, 1946. It does not appear to confer jurisdiction to try Brown.

58. At the trial, the decision in regard to guilt was by two-thirds vote of the ten members present at the second day of trial, 14 January 14th, and the other three members having been transferred subsequent to January 9th, which was the first day of trial.

59. The Articles of War require a concurrence of at least three-fourths of the members present in case of a trial on the charge of murder before the accused is deemed guilty. Therefore, the conviction is void and of no effect.

60. Petitioner alleges upon information and belief that there was no adequate review of the General Court Martial referred to above, in that the reviewing authorities failed to correct the serious and prejudicial errors herein complained of; each and all of which constitute a denial of due process of law and ousted the trial Court of jurisdiction.

61. The facts set forth in paragraphs 18, 19, 20, 23, 27, 28, and 30 to 48, inclusive, of this petition, constitute a denial of due process of law required by the Fifth Amendment of the Constitution of the United States, and also render the proceedings void and of no effect for failure to comply with the procedure essential to the jurisdiction and existence of a General Court Martial. This is true of each one of the paragraphs listed, independently of the others of said paragraphs. Therefore the trial, conviction, finding of guilt, sentence and commitment of Brown are entirely void.

62. The facts set forth in paragraphs 47 to 60, inclusive, of this complaint constitute a denial of due process of law within

15 the meaning of the Fifth Amendment to the Constitution of the United States. This is true of each of these paragraphs independently of the others of them, except paragraphs 49 and 52 and 52C.

63. The facts set forth in paragraphs 56, 57, 58, 59, and 60 render the conviction, finding of guilt, sentence and commitment totally void upon the face of the record. This is true of each of these paragraphs independently of the others.

64. All the errors set forth in this petition except those in regard to interpreter and counsel appear affirmatively from the Report of Pretrial Investigation and the Record of the Trial.

65. Each of the errors set forth in this petition was prejudicial. All these errors in the aggregate constituted a totality of errors of the gravest importance, and each and all resulted in great injustice to the petitioner.

66. Petitioner has no copy of the review by the Staff Judge Advocate or by the Board of Review; has no copy of the page of the guard book from noon to midnight of December 25, 1946, and demands that these be produced by the respondent; petitioner also demands that a copy of the pretrial investigation and the record of the trial and any comment in the record by the approving authority be produced by the respondent.

Whereupon, petitioner prays that a writ of Habeas Corpus be issued, directed to William H. Hiatt in his capacity as Warden of the United States Penitentiary, Atlanta, Georgia, commanding him to produce the body of the petitioner before this Court at a time and place to be specified in the writ, for the purpose of an examination into the legality of the restraint, then and there to receive and do what this Court shall order concerning the detention and restraint of petitioner, and that petitioner be ordered discharged from the detention and restraint referred to in this petition.

EUGENE PRESTON BROWN,
Petitioner.

WALTER G. COOPER,
Attorney for Petitioner.

[*Duly sworn to by Eugene Preston Brown, jurat omitted in printing.*]

17 In United States District Court

Order to show cause

Filed July 21, 1948

The foregoing petition considered.

It is ordered by the Court that the respondent show cause, if any he has, before this Court at Atlanta, Georgia, on the 8th day of September 1948, at ten o'clock A. M., why the said petition for writ of habeas corpus should not be granted.

At Atlanta, Georgia, this the 21st day of July, 1948.

E. MARVIN UNDERWOOD,
United States District Judge.

NOTE: Service omitted.

18

In United States District Court

Return of respondent

Filed Sept. 7, 1948

Now comes the respondent in the above entitled proceedings by his counsel, the United States Attorney for the Northern District of Georgia, and in response to the Order to Show Cause Why Petition for Writ of Habeas Corpus Should Not Be Granted states that he holds petitioner under and by virtue of General Court-Martial Orders No. 190, dated May 16, 1947, issued from Headquarters, Continental Base Section, European Command, a photostatic copy of which is hereto attached, marked Exhibit A and made a part of this response. A photostatic copy of the Record of Court Commitment pertaining to petitioner is also attached marked Exhibit B and made a part of this response.

Respondent avers that petitioner was not denied due process of law as alleged in his petition, or otherwise, and denies that any of the rights of petitioner under the Constitution were abridged as alleged in said petition, or otherwise.

Respondent avers, on the contrary, that the general court-martial proceedings leading up to and upon which were predicated the General Court-Martial Orders No. 190, referred to above, were regular in all respects and conducted in accordance with the provisions of the Articles of War and of the Manual for Courts-Martial as amended, and the regulations made in pursuance thereof, and that petitioner is being deprived of his liberty pursuant to the law in such cases made and provided.

Further answering the specific allegations in the petition, respondent admits, denies and alleges as follows:

19

1. Admits the allegations of paragraph 1 of the petition.
2. Admits petitioner is restrained of his liberty by being confined in the United States Penitentiary at Atlanta in this judicial district as alleged in paragraph 2 of petition, but, on information and belief, denies that the restraint is illegal. On the contrary, it is alleged that the restraint is under color and pursuant

to sentence of the court-martial hereinabove referred to and that said restraint is just as lawful.

3. Admits the allegations of paragraph 3 of petition.

4. Denies, on information and belief, that the cause or pretense of this restraint is a pretended conviction for murder and sentence therefor, by a general court-martial and a commitment issued thereunder as alleged in paragraph 4 of petition. On the contrary, it is alleged that the petitioner is restrained of his liberty by reason of a legal conviction for murder and sentence therefor, by a general court-martial whose proceedings were regular in all respects and conducted in accordance with the Articles of War and with the Manual for Courts-Martial, 1928, as amended, and upon which was predicated the General Court-Martial Orders No. 190 and the commitment order, both referred to above. Otherwise, the allegations of paragraph 4 of petition are admitted.

20 5. Denies, on information and belief, the allegations of paragraph 5 of petition and alleges, on the contrary, that the conviction or finding of guilt, and the sentence and commitment issued thereunder are legal and valid in all respects.

6. Admits the allegations of paragraph 6 of petition.

7. Answering the allegations of paragraph 7 of petition, admits petitioner was the only guard then on duty at the subject guard box but denies on information and belief that he was the only guard then on duty at the motor pool.

8, 9, and 10. Admits the allegations of paragraphs 8, 9, and 10 of petition.

11. Answering the allegations of paragraph 11 of petition, admits that Sergeant Olschewski and Private Kowalsczyk entered the guard box about 8:15 P. M., December 25, 1946; that neither was entering the guard box upon official business; that petitioner ordered them to leave; that petitioner followed them to the door; that he shot Kowalsczyk with his pistol and that Kowalsczyk died as a result of the gunshot wound so inflicted by petitioner. Upon information and belief the other allegations of paragraph 11 of petition are denied.

12. Admits allegations of paragraph 12 of petition.

21 13. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of petition.

14. Admits allegations of paragraph 14 of petition.

15. Admits the allegation of paragraph 15 of petition that petitioner was on guard duty alone but denies, on information and belief, that it was his duty to fire the shot and to fire it in the manner that he did.

16, 17, 18, 19, 20, 21, and 22. Admits allegations contained in paragraph 16 through 22 of petition.

23. Denies on information and belief that the only facts about the case contained in the Report of Investigation were a list of witnesses, Stone, Oaks, Olschewski, Miss Rehm, and the name of a pathologist as alleged in paragraph 23 of petition. Otherwise, admits allegations of paragraph 23 of petition.

24, 25, 26. Admits allegations of paragraphs 24 through 26 of petition.

27. Admits allegations contained in paragraph 27 of petition that the substituted charge of violation of the 92nd Article of War was not returned to the investigating officer for further investigation of the facts attending the homicide of Private Kowalsczyk, but on information and belief otherwise denies allegations contained in paragraph 27 of petition. On the contrary, it is alleged on information and belief that the full facts attending the homicide of Private Kowalsczyk were impartially investigated in accordance with Articles of War 70 by a duly appointed investigating officer who, through investigation of the original charge of violation of Article of War 93 (manslaughter), made complete inquiry into the circumstances surrounding the homicide of Private Kowalsczyk to determine if the evidence warranted trial by court-martial and who gave petitioner an opportunity to examine available witnesses against him and to present anything he wished in his own behalf. Under such circumstances it is manifest that further investigation based on the substituted charge of violation of Article of War 92 would have been repetitious and time-consuming and that no useful purpose, from either the petitioner's or the government's standpoint, would have been subserved thereby. Article of War 70 contemplates that charges will not be referred for trial unless the facts on which they are predicated have been impartially investigated and an accused given an opportunity to present anything he may wish in his own behalf. In the instant case the facts had been so investigated and the petitioner had been given an opportunity to cross-examine the witnesses against him; present witnesses in his own behalf and make a statement. Hence, it is contended that this impartial investigation of the facts on which the court-martial charges were predicated constituted substantial compliance with Article of War 70, consonant with the spirit thereof, rendering further investigation unnecessary and unwarranted.

28. Admits allegations of paragraph 28 of petition.

29. On information and belief the allegations of paragraph 29 of petition are denied. Respondent alleges that the court that tried petitioner was duly constituted and appointed; that it had jurisdiction over both the petitioner and the offense with which he was charged; that its sentence was legal and that its proceedings, in entirety, are lawful and valid irre-

spective of whether there was a formal investigation under Article of War 70 of the charges on which petitioner was tried. Respondent further alleges that there having been substantial compliance with the mandate of Article of War 70 as to investigation, the proceedings, conviction, sentence, and commitment of petitioner are lawful and valid irrespective of whether noncompliance with Article of War 70 is considered a jurisdictional defect. Respondent further alleges that the purpose of Article of War 70 is to fully develop the facts on which charges are predicated so that the appointing authority may determine what disposition should be made of the case in the interests of justice and discipline. Respondent admits that the report of investigation is furnished an accused so that he may benefit therefrom in connection with preparation of his case for trial but denies that one of the purposes of the investigation is to assist an accused in the preparation of his case for trial should trial be directed. Respondent avers that the provisions of Article of War 70 were substantially complied with in the subject case, and, in any event, that noncompliance therewith would not affect the jurisdiction of the court-martial.

Respondent, on information and belief, denies the allegations of paragraph 30 of the petition. On the contrary, respondent 24 avers that the pretrial investigation of the homicide of Private Kowalszyk by a duly appointed Investigating Officer, and conducted pursuant to Article of War 70, even though predicated on violation of Article of War 93 (manslaughter) rather than Article of War 92 (murder), constituted substantial compliance with Article of War 70 and Paragraph 35-a of the Manual for Courts-Martial.

31, 32, 33, 34, 35, 36, and 37. Respondent denies the allegations of paragraphs 31, 32, 33, 34, 35, 36, and 37 of petition alleging that he is without knowledge or information sufficient to form a belief as to the truths thereof. Respondent avers that in any event the necessity for investigation of these matters, was a matter to be determined at the discretion of the appointing authority and the officer conducting the investigation.

38 and 39. Denies, on information and belief, the allegations of paragraphs 38 and 39 of petition.

40, 41, and 42. Allegations of paragraphs 40 through 42 of petition are denied as respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

43 and 44. Admits allegations of paragraphs 43 and 44 of petition.

45. Denies, on information and belief, the allegations of paragraph 45 of petition.

25 46. Allegations of paragraph 46 of petition are denied as respondent is without knowledge or information sufficient to form a belief as to the truth of the allegation contained therein.

47. Allegations of paragraph 47 of petition are denied as respondent is without knowledge or information sufficient to form a belief as to the truth thereof, but in any event it is contended that this was a matter within the discretion of the prosecution, the defense and the court.

48. Allegation of paragraph 48 is denied as respondent is without knowledge or information sufficient to form a belief as to the truth thereof. Respondent admits that the Investigating Officer did not examine the following-named witnesses in the presence of the petitioner: Elisabeth Rehm, Richard F. Stone, Pfc. Carl A. Oaks, Franz Olschewski, Captain Roberts, and J. Brimi; but avers the petitioner did not want them examined in his presence.

49 and 50. Allegations of paragraphs 49 and 50 of petition are admitted.

51. Denies, on information and belief, that defense counsel did not speak English as alleged in paragraph 51 of petition. Denies, for lack of knowledge or information, that defense counsel did not speak German.

26 52. On information and belief, denies allegation of paragraph 52 of petition.

52a and 52b. Allegations of paragraphs 52a and 52b are denied as respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations.

52c. On information and belief denies allegations of paragraph 52c.

52d. On information and belief denies allegations of paragraph 52d and avers that it is always within the discretion of the appointing authority to appoint as defense counsel any officers whom he considers qualified.

53. Allegation of paragraph 53 of petition is denied as respondent is without knowledge or information sufficient to form a belief as to the truth of this allegation.

53a. On information and belief the allegation of paragraph 53a of petition is denied. On the contrary, respondent alleges that petitioner was duly accorded defense counsel and that he stated at the outset of the trial that he desired to introduce the regularly appointed defense counsel as his counsel. Further it is alleged that his defense counsel was present with him in court at that time and ably defended petitioner throughout the proceedings.

27 54. The allegations of paragraph 54 of petition are denied inasmuch as respondent is without knowledge or information sufficient to form a belief. In any event respondent alleges

that even if the official interpreter at the court-martial had been an enemy alien this fact would not have rendered the proceedings void.

55. As to the allegations of paragraph 55, respondent denies on information and belief that qualified interpreters in the Army of the United States were readily available for either or both the Polish and the German language.

56. Allegations of paragraph 56 of petition are denied on information and belief. Respondent, on the contrary, alleges that the evidence adduced at the trial of petitioner by court-martial was legally sufficient to sustain the court's findings of guilty.

57. Allegations of paragraph 57 of petition that court-martial that tried petitioner was without jurisdiction is denied, on information and belief. Paragraph 2 of Special Orders No. 273, Headquarters, Continental Base Section, United States Forces, European Theater, dated December 7, 1946 properly and legally appointed the court-martial that tried petitioner. Inasmuch as many such special orders are lengthy and the contents thereof, other than the paragraph appointing the court, have no relation to courts-martial, it has become customary to append to a record of trial an extract therefrom containing only the paragraph appointing the court-martial. Paragraph 2, Special Orders 273, *supra*, clearly conferred jurisdiction upon the court and the official extract copy thereof is adequate evidence thereof.

58. Allegation of paragraph 58 of petition is admitted.

59. On information and belief, allegation of paragraph 59 of petition is denied. Respondent alleges that under Article of War 43 only a two-thirds vote of the members present at the time the vote is taken is necessary to sustain a conviction for murder and that, therefore, the conviction in petitioner's case was lawful.

60. Allegation of paragraph 60 of petition is denied on information and belief. Respondent alleges that the verdict in this case was adequately reviewed first by the Staff Judge Advocate and then by the Board of Review in the Office of The Judge Advocate General in Washington, D. C. and in each case the court's findings were sustained.

61. On information and belief respondent denies the allegations of paragraph 61 of petition.

62. Answering the allegations contained in paragraph 62 of petition respondent, on information and belief, denies that there has been a denial of due process of law within the meaning of the 5th Amendment to the Constitution of the United States as alleged and, on the contrary, alleges that due process of law was accorded the petitioner at all times and in all respects.

63. Answering the allegation contained in paragraph 63 of petition, respondent on information and belief denies that the conviction, finding of guilty, sentence and commitment are void, and, on the contrary alleges that they are valid and lawful in each and every respect.

64 and 65. On information and belief, respondent denies the allegations of paragraphs 64 and 65 of petition.

Respondent further avers, in conclusion, that if any of the errors and omissions alleged were committed, or omitted, they did not constitute a denial of due process of law; did not oust the court of jurisdiction and did not in any way infringe upon, abridge, or deny the constitutional rights of petitioner.

Wherefore having fully answered respondent prays that the Order to Show Cause Why the Writ of Habeas Corpus Should Not Be Granted be denied and the petition dismissed.

J. ELLIS MUNDY,

United States Attorney.

HARVEY H. TYSINGER,

Assistant United States Attorney.

EUGENE M. CAFFEY,

Colonel, Judge Advocate General's Department.

H. M. PEYTON,

Lieutenant Colonel,

Judge Advocate General's Department,

Counsel for Respondent.

NOTE: Exhibit "A" attached to this response omitted. See Exhibit No. 1—Original Court-Martial Record.

31 *Exhibit "B" to return*

Record Form No. 1
(Revised Feb., 1936)

Budget Bureau No. 43-R221
Approval Expires 7-31-47

UNITED STATES DEPARTMENT OF JUSTICE

Penal and Correctional Institutions

RECORD OF COURT COMMITMENT

UNITED STATES PENITENTIARY,

Atlanta, Georgia.

Inst. Name, Eugene P. Brown; No. 67800; Color, White; Age (8-27-07), 40; True Name, Eugene Preston Brown; Name and number of prior commitments to Fed. Inst. 4395-C 7979-LEE; Offense, Murder; District, Army—Germany GCMO 190 ASN 34 001 224; Sentence, 20 Years; Costs-Fine, None.

Sentenced, Jan. 14, 1947; When arrested, Dec. 25, 1946; Committed to Fed. Inst. Sept. 24, 1947; Where arrested, Stuttgart, Germany; Sentence begins, Jan. 14, 1947; Residence, Hendersonville, N. C.; Eligible for Parole, Sept. 13, 1953; Time in jail before trial, Since arrest; Eligible for conditional release with good time, Jul. 21, 1960; Rate per mo. good time, 10; Total good time possible, 2317; Military Good Time, 50; Total 2367.

Expires full term, Jan. 13, 1967; Person to be notified in case of serious illness or death: Name, Mrs. M. L. Mullis; Relation to prisoner, Sister; Address, Box 75, Advance, N. C.

32

In United States District Court

Order to traverse response

Filed Sept. 7, 1948

The foregoing Response having been filed to the Order To Show Cause Why Petition for Writ of Habeas Corpus Should Not Be Granted, it is

Ordered that a copy of the Response and of this Order be served upon the petitioner and that he be permitted to traverse same within seven days or else the same will be taken as true.

This 7th day of September 1948.

ROBERT L. RUSSELL,
United States District Judge.

33

In United States District Court

Traverse of respondent's return

Filed Sept. 10, 1948

1. Petitioner traverses and denies each and every allegation and argument in the Respondent's return which in anywise contradicts, denies or avoids the allegations of the original petition with but three exceptions, as follows:

(a) It is admitted that neither the Trial Judge Advocate, nor the Assistant Trial Judge Advocate, was a member of the Judge Advocate General's Department. Whether either, or both, were lawyers is not known to petitioner.

(b) Petitioner did say in effect that he desired to be represented by counsel appointed for him. It is believed that defense counsel was already known to the Court, and that the assertion that the petitioner introduced defense counsel to the Court is not an adequate or fair statement of what occurred at the trial. It is admitted that the one defense counsel was present in Court throughout the trial.

(c) It is true that one or more Polish guards in the employ of the Army of the United States, or the War Department, were on duty in the Motor Pool at 8:15 P. M. December 25, 1946, but they were not at the guard box.

2. Petitioner further alleges, by way of Traverse to the Return, that he denies the introductory portion of the Return that alleges that there was no denial of due process of law, that the rights of the petitioner were not abridged, that the general court-martial proceedings were regular, and that they were conducted in
34 accordance with the Articles of War and the Manual for Courts-Martial as amended, and regulations thereunder, and that petitioner is deprived of his liberty pursuant to the law.
E. P. B.

3. The allegations in paragraph 2 of the Return, that the restraint is not illegal but is just and lawful, are denied.

4. The allegations in paragraph 4 of the Return, that there was a legal conviction and sentence, that the proceedings were regular and conducted in accordance with the Articles of War and the Manual of Courts-Martial, 1928, as amended, are denied.

5. The allegations in paragraph 5 of the Return, that the conviction, finding of guilt, sentence and commitment are legal and valid, are denied.

6. (Paragraph 6 omitted.)

7. All the allegations of paragraph 11 of the Return, except the admissions, are denied.

8. Paragraph 13 is denied.

9. The allegations of paragraphs 15 and 23, except the admissions, are denied.

10. It is admitted that Article of War 70 contemplates
35 that charges will not be referred for trial unless the facts on which they are predicated have been impartially investigated and an accused given an opportunity to present anything he may wish in his own behalf. The other affirmative allegations of paragraph 27 of the Return, except the admissions, are denied.

11. The allegations of paragraph 29 of the Return are denied, except that it is admitted that one of the several purposes of Article of War 70 is to fully develop the facts for the information of the appointive authority, and that the report of investigation is furnished to the accused.

12. Paragraphs 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47 and 48 (except the admissions in 48) are denied. In paragraph 48, the words "Captain Roberts, and J. Brimi" appear as "Captain Robert J. Brimi" in the copy of the record obtained by petitioner.

13. In paragraph 51, the allegation that defense counsel did speak German is denied.

14. Paragraphs 52, 52a, 52b, 52c, 52d, and 53 are denied.

15. Paragraph 53a is denied, except as above stated in paragraph 1 (b) of this traverse.

16. Paragraphs 54, 55 and 56 are denied.

36 17. Paragraph 57 is denied, except that for want of sufficient information the petitioner can neither admit nor deny the allegations as to the length of Special Orders. With reference to whether other parts of these orders concern the Court-Martial, it is necessary that these orders be produced in this case. What they do in other cases can neither be admitted nor denied for want of sufficient information.

18. Paragraphs 59 and 60 are denied, except the allegation that the findings were sustained. The reduction in sentence indicates disapproval of the results of this case.

19. Paragraphs 61, 62, 63, 64, 65, and the allegations subsequent thereto above the signatures, are denied.

20. The notices to produce and demands of paragraph 66 of the petition and of the letter of August 4 to government counsel are each and all still insisted upon.

Respectfully submitted.

EUGENE PRESTON BROWN,
Petitioner.

WALTER G. COOPER,
Attorney for Petitioner.

37 [*Duly sworn to by Eugene P. Brown, jurat omitted in printing.*]

38 In United States District Court

First amendment to petition

Filed Sept. 13, 1948

Plaintiff tenders the following amendment:

After paragraph 28 of the petition, the following paragraph is inserted:

28A. The record of pretrial investigation indicates that the charge and specification were signed at Headquarters, Continental Base section, Bad Nauheim, Germany, December 30, 1946, by an accuser stationed there. It is believed and alleged that he had no opportunity to, and did not investigate the charge and specification before signing, and that he did not have personal knowledge of, the matters set forth in the charge and specification, except that he may have read the Report of Pretrial In-

vestigation that had been filed December 27, 1946, already referred to. By reason of the facts stated in this paragraph, the 70th. Article of War was not complied with, the court had no jurisdiction, and there was a denial of due process of law that is provided in the Fifth Amendment to the Constitution of the United States.

After paragraph 30 of the petition, the following paragraph is inserted:

30A. The pretrial investigation appears to have been made with a view to prosecution without a realization that one of the principal purposes of pretrial investigation is to obtain and report evidence and facts for the use of the defense as well as the prosecution. It is therefore charged upon information and belief
39 that the pretrial investigation was not impartial as required by the 70th. Article of War and Section 35A of the Manual of Courts-Martial, as amended, and that this error constituted a denial of due process of law that is provided in the Fifth Amendment to the Constitution of the United States.

After paragraph 46 of the petition, the following paragraph is inserted:

46A. In the pretrial investigation, petitioner was not given any opportunity to cross-examine witnesses against him, though they were available. He was not told the names of any of the witnesses against him, nor told of his rights to present anything he might desire in his own behalf (except his own statement). These facts were violations of the 70th. Article of War. Because of them, there was no jurisdiction to try the case, and there was a denial of due process of law within the meaning of the Fifth Amendment to the Constitution.

To paragraph 52B the following is added:

The failure to have a trained and experienced lawyer included among defense counsel prejudiced petitioner.

After paragraph 57 of the petition, the following paragraph is inserted:

57A. The law member of the court was not a member of the Judge Advocate General's Department. An officer of that department was available for the purpose. This is charged upon information and belief. By reason of the facts stated in this paragraph, the 8th. Article of War was violated, and the Court
40 was not constituted as required by law and did not have jurisdiction over the person of the accused, or over the trial of the charge and specification. The facts stated in this paragraph were not known to Brown until after the filing of his petition.

Motion is hereby made for an order allowing the amendment.
Respectfully submitted.

EUGENE PRESTON BROWN.

WALTER G. COOPER,
Attorney for Petitioner.

[*Duly sworn to by Eugene Preston Brown, jurat omitted in printing.*]

41

In United States District Court

Order allowing amendment

Filed Sept. 13, 1948

The foregoing amendment is hereby allowed and ordered filed, subject to objection within seven days from notification of respondent. This the 13th day of September, 1948.

E. MARVIN UNDERWOOD,
Judge, United States District Court.

NOTE: Service omitted.

42

In United States District Court

Return of respondent to first amendment to petition

Filed Sept. 17, 1948

Respondent in the above entitled proceedings, answering the specific allegations in the First Amendment to Petition, admits, denies and alleges as follows:

28A. Admits that the record of pretrial investigation indicates that the charge and specification were signed at Headquarters, Continental Base Section, Bad Nauheim, Germany, December 30, 1946, as alleged in paragraph 28A of First Amendment to Petition. Avers that he is without knowledge or information sufficient to form a belief as to the truth of the allegation contained therein that the accuser had no opportunity to and did not investigate the charge and specification before signing, except that he may have read the Report of Pretrial Investigation that had been filed December 27, 1946. Denies, on information and belief, that by reason of the facts stated in paragraph 28A of First Amendment to Petition, the 70th Article of War was not complied with, that the court had no jurisdiction, and that there was a denial of due process of law as provided in the Fifth Amendment to the Constitution of the United States.

30A, 46A, 52B. Denies on information and belief the allegations of paragraphs 30A, 46A, and 52B of First Amendment to Petition.

43 57A. Admits the allegation in paragraph 57A of First Amendment to Petition that the law member of the court was not a member of the Judge Advocate General's Department. Denies on information and belief the other allegations of Paragraph 57A of First Amendment to Petition.

J. ELLIS MUNDY,
United States Attorney,

HARVEY H. TYSINGER,
Assistant United States Attorney,

EUGENE M. CAFFEY,
Colonel, Judge Advocate General's Department,

H. M. PEYTON,
Lieutenant Colonel,
Judge Advocate General's Department,
Counsel for Respondent.

44 In United States District Court

Traverse to response to first amendment to petition

Filed Sept. 21, 1948

1. Petitioner traverses and denies, upon information and belief, each and every allegation and argument in the Respondent's Return to First Amendment to Petition which in anywise contradicts, denies, or avoids the allegations of the First Amendment to Petition.

2. The allegations of paragraph 28A of the said Return which deny the allegations of paragraph 28A of the First Amendment to Petition are traversed and denied, upon information and belief.

3. The allegations of paragraph 30A of said Return which deny the allegations of paragraph 30A of the First Amendment to Petition are traversed and denied, upon information and belief.

4. The allegations of paragraphs 46A and 52B of said Return which deny the allegations of paragraphs 46A and 52B of the First Amendment to Petition are traversed and denied.

45 5. The allegations of paragraph 57A of said Return which deny certain allegations of paragraph 57A of the First Amendment to Petition are denied, upon information and belief.

EUGENE PRESTON BROWN,
Petitioner.

WALTER G. COOPER,
Attorney for Petitioner.

[Duly sworn to by Eugene Preston Brown, jurat omitted in printing.]

In United States District Court

Second amendment to petition

Filed Sept. 28, 1948 .

Plaintiff tenders the following amendment:

After paragraph 21 of the petition, the following paragraphs are inserted:

21A. This charge and specifications were not signed other than by the initials "EEN" which were the initials of the Company Commanding Officer and were placed upon the margin of the specification. Whether they were placed there to indicate a signature or to show an approval of a typographical change, if there was one, is not known to petitioner. Captain E. E. Noel, the Company Commanding Officer, did not sign an oath that he had personal knowledge of matters set forth in the specification or that he had investigated them. On December 27, 1946, he transmitted to the Battalion Commanding Officer the charge and specification and also the following papers:

- #1. Court Martial Charge Sheets in triplicate.
- #2. Statement of Elisabeth Rehm in triplicate.
- #3. Statement of Private Richard E. Stone in triplicate.
- #4. Statement of Private First Class Carl A. Oaks in triplicate.
- #5. Statement of Sergeant Franz Olschewski in triplicate (This statement was undated, 22 lines in German, 18 lines in the English translation).

#6. Statement of Captain Robert J. Brimi in triplicate (Autopsy report, 25 lines long).

#7. Record of Previous Convictions in triplicate.

21B. The charge and specification were not accompanied by the oath of the accuser that he had personal knowledge of the matters set forth in the specification or had investigated them. This was a violation of the 70th Article of War. For this reason, the Court-Martial did not have jurisdiction, and there was a denial of due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

After paragraph 23 of the petition, the following paragraphs are inserted:

23A. Of those nine papers listed in paragraph 23 that constituted the Report of the Pretrial Investigation, the first seven upon the list were the identical papers that had been transmitted by the Company Commanding Officer to the Battalion Commanding Officer with the charge and specification before the appointment of the Investigating Officer on December 27, 1946.

23B. It is believed that the Report of Pretrial Investigation and accompanying papers of transmittal indicate, and it is there-

fore alleged upon information and belief, that the only investigation conducted by the Investigating Officer was his interview of the petitioner, and his reading of the seven papers listed in paragraph 21A that had been transmitted on December 27, 1946 by the Company Commanding Officer to the Battalion Commanding Officer with the charge and specification.

23C. The failure of an Investigating Officer to conduct any investigation other than an interview with the accused and
48 a reading of five statements accompanying the charge and specification is a violation of the 70th Article of War. By reason of such facts, there is no jurisdiction for the Courts-Martial to try the charge and specification, and such purported trial is a denial of due process of law within the meaning of the Fifth Amendment to the Constitution of the United States, and all subsequent proceedings in such case are entirely void.

Motion is hereby made for an order allowing this amendment.
Respectfully submitted.

EUGENE PRESTON BROWN.

WALTER G. COOPER,
Attorney for Petitioner.

[Duly sworn to by Eugene Preston Brown, jurat omitted in printing.]

49 In United States District Court

Order allowing amendment

Filed Sept. 28, 1948

The foregoing amendment is hereby allowed and ordered filed.
There being no objection.

This 28 day of September, 1948.

E. MARVIN UNDERWOOD,
United States District Judge.

50 In United States District Court

Third amendment to petition

Filed Oct. 6, 1948

Petitioner tenders the following amendment:

To paragraph 52B of the petition as previously amended, the following is to be added:

The representation accorded petitioner by the defense counsel in the Court-Martial was so inadequate as to amount to a denial

of due process of law, apart from whether defense counsel was a lawyer. And Brown was deprived of the effective assistance of counsel, contrary to the Sixth Amendment to the Constitution of the United States.

Motion is hereby made for the allowance of this amendment.
Respectfully submitted.

WALTER G. COOPER,
Attorney for Petitioner.

51 [Duly sworn to by Walter G. Cooper; jurat omitted in printing.]

In United States District Court

order allowing amendment

Filed Oct. 6, 1948

The foregoing amendment is hereby allowed and ordered filed.
This the 6th day of October 1948.

E. MARVIN UNDERWOOD,
United States District Judge.

Consented to

HARVEY H. TYSINGER,
Asst. U. S. Attorney.

52

In United States District Court

Request for admissions under Rule 36

Filed Sept. 14, 1948

Plaintiff Eugene Preston Brown requests defendant William H. Hiatt, Warden, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

1. In the pretrial investigation, there was no investigation of the litre whiskey bottle for finger prints of Kowalsczyk, or to determine where it came from, or whether Sergeant Olschewski or Private Kowalsczyk, or both, had been drinking from it. The bottle is the one referred to in the statement of petitioner before his trial, the statement being a part of the pretrial investigation report.

2. In the pretrial investigation, there was no investigation as to whether Sergeant Olschewski or Private Kowalsczyk had been drinking alcoholic beverages from any other source.

3. In the pretrial investigation, in the autopsy of Kowalsczyk, there was no report in regard to whether he had been drinking alcoholic beverages.

4. In the pretrial investigation, there was no investigation as to whether Sergeant Olschewski or Private Kowalsczyk was violent and quarrelsome in disposition.

53 5. In the pretrial investigation, there was no investigation as to whether the Polish guards at the Motor Pool were violent, quarrelsome and difficult to handle.

6. In the pretrial investigation, there was no investigation of the veracity or character of Sergeant Olschewski.

7. In the pretrial investigation, there was no investigation of the clothing of Private Kowalsczyk to determine whether the shot was fired from a short distance.

8. In the pretrial investigation, there was no interrogation of several of those who came to the scene after the shot was fired.

9. In the pretrial investigation, there was no interrogation by the Investigating Officer of the Military Police called to the scene, or the police who took Eugene P. Brown into custody, or the police who took Sergeant Olschewski and Elisabeth Rehm into custody.

10. In the report of the pretrial investigation, the translation of the statement of Sergeant Olschewski was incorrect in that it erroneously stated that he said that upon entering the guard box, he and Private Kowalsczyk saluted, and in later attributing
54 to Sergeant Olschewski the statement, "It is OK boy," when the statement was "Boy is OK." With these uncorrected errors, the copy of the statement was furnished to defense counsel.

11. In the pretrial investigation, there was no investigation of what orders had been issued to the Polish guards with reference to entering the guard box when not on duty.

12. Defense counsel did not speak German or Polish.

13. Defense counsel was not a lawyer.

14. Officers qualified to be defense counsel and with a speaking knowledge of German and Polish were available to be included among counsel for Eugene P. Brown.

15. The interpreter who served at the trial was then an enemy alien.

16. Qualified interpreters of German and Polish were then and there available from personnel of the Army of the United States.

17. The Department of the Army on 7 June 1948 refused the request of petitioner's attorney for permission to obtain a copy of the opinion of the Board of Review in this petitioner's case.

55 The time within which the respondent is notified to serve upon the petitioner a sworn statement denying specifically the matters above or setting forth in detail the reasons why he cannot truthfully admit or deny them, or written objections on the ground that some of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or

in part, together with a notice of hearing the objections at the earliest practicable time, is hereby designated as September 24, 1948.

WALTER G. COOPER.

NOTE: Service omitted.

56

In United States District Court

Reply to request for admission of facts

Filed Sept. 17, 1948

Respondent in the above entitled proceeding makes the following statement in response to the request for admission of facts served upon him by petitioner.

1. He denies, on information and belief, the truth of the matters set forth in paragraphs 14 and 16 of the aforesaid request.

2. He states that he cannot truthfully admit the matters set forth in paragraphs 1 through 13, and 15 and 17 of said request for the reason that he is without knowledge or information sufficient to form a belief as to the truth thereof and consequently the truth thereof is denied.

J. ELLIS MUNDY,

United States Attorney,

HARVEY H. TYSINGER,

Assistant United States Attorney,

EUGENE M. CAFFEY,

Colonel, Judge Advocate General's Department,

H. M. PEYTON,

Lieutenant Colonel,

Judge Advocate General's Department,

Counsel for Respondent.

57

In United States District Court

Request for Admission of Facts

Filed Sept. 14, 1948

Petitioner requests that the respondent admit:

1. The allegations of paragraph 31 of the petition.
2. The allegations of paragraph 32 of the petition.
3. The allegations of paragraph 33 of the petition.
4. The allegations of paragraph 34 of the petition.
5. The allegations of paragraph 35 of the petition.
6. The allegations of paragraph 36 of the petition.
7. The allegations of paragraph 37 of the petition.
8. The allegations of paragraph 38 of the petition.

9. The allegations of paragraph 40 of the petition.
10. The allegations of paragraph 41 of the petition.
11. The allegations of paragraph 42 of the petition.
- 58 12. The allegations of paragraph 46 of the petition.
13. The allegations of paragraph 48 of the petition.
14. The allegations of paragraph 51 of the petition.
15. Defense counsel was not a lawyer.
16. The allegations of paragraph 53 of the petition.
17. The interpreter who served at the Court-Martial was an enemy alien.
18. The allegations of paragraph 55 of the petition.
19. The Department of the Army on 7 June 1948, refused the request of petitioner's attorney for permission to obtain a copy of the opinion of the Board of Review in this petitioner's Court-Martial case.

WALTER G. COOPER,
Attorney for Petitioner.

NOTE: Service omitted.

59 In United States District Court

Reply to request for admission of facts

Filed Sept. 28, 1948

Respondent in the above entitled proceeding, makes the following statement in response to the request for admission of facts served upon him by petitioner:

1. He denies, on information and belief, the truth of the matters set forth in paragraphs 8 and 18 of the aforesaid requests.

2. He states that he cannot truthfully admit the matters set forth in paragraphs 1 through 7, 9 through 17 and 19 of said request for the reason that he is without knowledge or information sufficient to form a belief as to the truth thereof and consequently the truth thereof is denied.

J. ELLIS MUNDY,
United States Attorney,

HARVEY H. TYSINGER,
Assistant United States Attorney,

EUGENE M. CAFFEY,
Colonel, Judge Advocate General's Department,

H. M. PEYTON,
Lieutenant Colonel,
Judge Advocate General's Department,
Counsel for Respondent.

In United States District Court

Petitioner's interrogatories to respondent

Filed Sept. 14, 1948

1. State the age, previous investigative experience, previous legal experience, previous civilian experience of every kind, and legal education of defense counsel at the petitioner's trial, of the Trial Judge Advocate, and of the Assistant Trial Judge Advocate.

2. To what extent did the Trial Judge Advocate, the Assistant Trial Judge Advocate, and the Defense Counsel speak and understand German and Polish?

3. Who were five of the persons in the Army nearest to Mannheim, Germany, at the time of the trial, with a knowledge of German sufficient for an interpreter, and who were then available for such service?

4. Who were five of the persons in the Army nearest to Mannheim, Germany, at the time of the trial, with a knowledge of Polish sufficient for an interpreter, and who were then available for such purpose?

5. Attach a copy of the omitted portions of the order of December 7, 1946, that appointed the Court-Martial that
61 tried petitioner, which do not appear in the Record of the Trial.

6. If the entire order of December 7, 1946, that appointed the General Court-Martial that tried petitioner is in existence, in whose custody is it, and where is it located? If this information is not available with reference to the original order, the same questions are asked with reference to the copy thereof that is most accessible.

7. What was the nationality of the interpreter at the trial?

8. State the names of ten officers of the Army of the United States, and their stations at the time, who were at the time of the trial of petitioner by General Court-Martial members of the Judge Advocate General's Department, and who were the nearest such officers to Mannheim, Germany, and who were available for service upon a General Court-Martial. This includes not only officers then stationed in Germany but others who were in other countries in Europe or in Africa or America.

9. What investigation was conducted by the officer who on December 30, 1946 signed a charge of violation of the 92nd Article of War and a specification of murder, before he signed? After he signed?

WALTER G. COOPER,
Attorney for Petitioner.

NOTE: Service omitted.

62

In United States District Court

Objection and answer to interrogatories

Filed Sept. 17, 1948

Respondent objects generally to the Petitioner's Interrogatories to Respondent, heretofore served on him by the petitioner on the following grounds:

a. That respondent does not know of personal knowledge or on information and belief the answers to the interrogatories propounded by petitioner.

b. That the information called for is irrelevant to any issue in the case.

c. That the information sought would require a detailed investigation entailing expense to the respondent whereas the petitioner is equally able to conduct such investigation in his own behalf.

1, 2. Interrogatories 1 and 2: This information may be obtained direct from the persons concerned whose last known address to military authorities may be obtained by writing The Adjutant General, Department of the Army, Washington, D. C., direct.

3, 4. Interrogatories 3 and 4: Respondent does not know of any source from which this information may be readily procured.

5. Interrogatory 5: Respondent does not have a copy of this order in his possession.

63 6. Interrogatory 6: Copy of such order is presumably in the dead file of the Department of the Army and may be procured by making application therefor direct to The Adjutant General, Department of the Army, Washington, D. C.

7. Interrogatory 7: This information may presumably be procured by contacting the German authorities in the city concerned.

8. Interrogatory 8: This would entail considerable research on the part of the military authorities, and it is doubtful if such research would accurately reflect the information requested. However, inquiry may be directed to The Adjutant General, Department of the Army.

9. Interrogatory 9: This information may be obtained by writing the individual concerned direct.

J. ELLIS MUNDY,
United States Attorney,

HARVEY H. TESINGER,
Assistant United States Attorney,

EUGENE M. CAFFEY,
Colonel, Judge Advocate General's Department,

H. M. PEYTON,
Lieutenant Colonel,
Judge Advocate General's Department,
Counsel for Respondent.

In United States District Court

Motion for production of documents

Filed Sept. 14, 1948

Petitioner Eugene Preston Brown moves the Court for an order requiring respondent William H. Hiatt, Warden, to produce and to permit petitioner to inspect and to copy the omitted portion of the order of 7 December 1946, that being the order that appointed the General Court Martial that tried petitioner.

It is believed that the Department of the Army has the custody, possession, or control of said document, or that it or a copy of it has been transmitted to the Department of Justice. It constitutes or contains evidence relevant and material to a matter involved in this action as is more fully shown in Exhibit A hereto attached. Two officers of the Judge Advocate General's Department of the Army have appeared as Counsel for Respondent.

WALTER G. COOPER.

*Notice of motion*To: J. ELLIS MUNDY, *United States Attorney.*HARVEY H. TYSINGER, *Assistant United States Attorney.*Colonel EUGENE M. CAFFEY, *Judge Advocate General's Dept.*Lieutenant Colonel H. M. PEYTON, *Judge Advocate General's Department.*

Counsel for Respondent: Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room 322, Old Post Office Building, Atlanta, Georgia, at 10:00 A. M. on the 20th day of September 1948, or as soon thereafter as counsel can be heard.

WALTER G. COOPER.

Affidavit of Walter G. Cooper

STATE OF GEORGIA,

County of Fulton.

Walter G. Cooper, first being duly sworn says:

The order of December 7, 1946, appointing the General Court-Martial that tried petitioner, being an Army order, is presumably, if in existence, in the possession, custody or control of the Department of the Army if it has not been turned over to the Department of Justice. On June 7, 1948, the Chief, Clemency Branch, Military Justice Division, Office of the Judge Advocate General, Department of the Army wrote me, "The records of this office in Brown's case contain only paragraph 2, extracted from Special Orders Number 273, Headquarters Continental Base Section, U. S. Forces European Theater, dated 7 December 1946."

On August 4, 1948, I wrote to Mr. H. H. Tysinger, Assistant United States District Attorney, giving notice that even if it was necessary for a communication to be sent to Headquarters, CBS, USFET, that the entire order of 7 December 1946 be produced September 8, 1948, in the Return. On September 8, 1948, when the omitted portion of the order was not contained in the Return, I wrote to Lieutenant Colonel H. M. Peyton, Judge Advocate General's Department, one of the Defense Counsel, what I had stated to Mr. H. H. Tysinger in person on September 7 or 8, 1948, that I was requesting advice whether said order will be at the hearing. On 9 September 1948, Colonel Eugene M. Caffey, Judge Advocate General's Department, in reply to my letter of the 8th wrote me, "The rest of the order of December 7, 1946, is not in the possession of the respondent so that it will not be introduced by him at the hearing."

66 From inference from reading the extract of that order that appears in the Record of the Trial, it seems possible and not improbable that the omitted portion of the order may relate materially to the General Court-Martial then being appointed. It may have dealt with the duration or termination of the General Court-Martial or its jurisdiction. As a matter of law, it seems that the entire order appointing the Court ought to be in the Record of the Trial and produced at the hearing. By inference from reading an article by the Honorable Kenneth C. Royall, now Secretary of the Army, that appeared in the Virginia Law Review, it seems possible and not improbable that the omitted portion may be similar to a charge to a Grand Jury and may contain suggestions, recommendations, requests or instructions in regard to discipline, justice or procedure, and that they may concern a case such as the petitioner's case. It is the belief of the undersigned that the omitted portions of that order may or may not be relevant upon the questions of the jurisdiction of the Court and upon the question of due process of law. What is told to the Court by the Commanding or Appointing Officer may affect its jurisdiction and the question of whether the petitioner has been accorded due process of law, it is believed.

WALTER G. COOPER.

Subscribed and sworn to before me this the 13th day of September 1948.

[NOTARIAL SEAL]

FRANCES H. WILLIAMS,
Notary Public, Fulton County, Georgia.

In United States District Court

Order granting writ

Filed Sept. 22, 1948

Upon consideration of the above case on Return and Traverse thereto on Rule Nisi, and upon the First Amendment to Petition, and Return and Traverse following same, as well as the original Petition, It is considered, ordered, and adjudged that Writ of Habeas Corpus issue as prayed, returnable before me at the Old Post Office Building, Atlanta, Georgia, at 10:00 o'clock in the forenoon on the 28th day of Sept. 1948, and from day to day thereafter until discharged by the Court.

This September 22nd, 1948.

E. MARVIN UNDERWOOD,
United States District Judge.

68 *Petitioner's Exhibit No. 2—Letter Drissel to Cooper*

DEPARTMENT OF THE ARMY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington 25, D. C., June 7, 1948.

JAGD CM 320696.

WALTER G. COOPER, Esq.,
*404 The 22 Marietta St. Bldg.
Atlanta 3, Georgia.*

DEAR MR. COOPER: Receipt is acknowledged of your letter dated 13 May 1948 pertaining to the trial by general court-martial of General Prisoner Eugene P. Brown, formerly Technician Fifth Grade, ASN 34001224. You request a copy of the report of the pretrial investigation, the letter referring the case to the investigating officer, the opinion of the Board of Review, the entire order appointing the court, the extract copy of the Guard Book, 994th Ord HAM Company, and any data in the file concerning an investigation by the defense counsel.

You may obtain photostatic copies of the 19-page report of the pretrial investigation and of the 1-page extract copy of the Guard Book, 994th Ord HAM Company, by sending to this office a certified check or postal money order in the amount of \$4.00, payable to Leet Bros. Co., Inc., or to some other reputable firm in the Washington, D. C., area, together with the written request of General Prisoner Brown that the copies be furnished to you. If any firm other than Leet Bros. Co., Inc., is employed, the amount should be computed on that firm's rate, which must be ascertained in advance. The letter referring the case to the investigating

69 officer is included in the report of investigation. The review by the Board of Review in this case refers to material which is considered confidential and, therefore, it is not available for distribution.

The records of this office in Brown's case contain only paragraph 2, extracted from Special Orders Number 273, Headquarters Continental Base Section, U. S. Forces European Theater, dated 7 December 1946. It is believed that a copy of paragraph 2 of Special Orders Number 273, is a part of the record of trial you have in your possession. There is no data in the record of trial or allied papers relative to the investigation made in this case by defense counsel.

Sincerely yours.

V. HOMER DRISSEL,
Major, JAGD,
Chief, Clemency Branch,
Military Justice Division.

70 *Petitioner's Exhibit No. 3—Letter to Office of the
Judge Advocate General*

MAY 13, 1948.

*Office of the Judge Advocate General,
Army of the United States,
Washington, District of Columbia.*

DEAR SIR: In behalf of a client, Eugene P. Brown, Reg. No. 67800-A, ASN RA 34001224, formerly Technician Fifth Grade, now, a prisoner at the United States Penitentiary at Atlanta, Georgia, this is to respectfully request the following papers:

1. Copy of Report of Investigation upon the charge of murder of Josef Kowalsczyk, prior to General Court-Martial of T/5 Brown, at Mannheim, Germany, in 1947.

2. Copy of letter referring the case to the Investigating Officer.

3. Copy of opinion of the Board of Review in regard to the case.

4. A copy of the entire order appointing the General Court-Martial at which the case was tried.

5. A copy of the Extract Copy of the Guard Book, 994th Ord HAM Company, which was introduced in evidence in the case.

6. Any data in the file concerning investigation by Defense Counsel.

7. Any other information in the file that is relevant, except the Record of the Trial, which I have. Item 5, however, is not included in this Record that I have.

71 The undersigned is attorney at law for Eugene Preston Brown. Written evidence of employment in this capacity

has been filed with the Office of the United States Penitentiary, Atlanta, Georgia.

Very respectfully yours.

Attorney for Eugene Preston Brown.

WGC ip.

72

In United States District Court

Before: Honorable E. MARVIN UNDERWOOD, Judge

Sept. 20, 1948

Appearances: For the petitioner—WALTER G. COOPER, Esq. For the respondents—Col. H. M. PEYTON, JAGD; H. H. TYSINGER, Asst. U. S. Attorney.

Colloquy

By Mr. COOPER. Your Honor, in habeas corpus 2320, the motion for production of documents, does Your Honor wish to hear that at this time?

By the COURT. I have not seen that. Has the motion been set down?

By Mr. TYSINGER. The notice was given to opposing counsel more than five days ago, it has not been officially set.

By the COURT. Any objection to this motion?

By Mr. TYSINGER. May it please the court, it is a regular habeas corpus based on a court martial record, and Colonel Caffey and Colonel Peyton are here. They will give you a better explanation of what the petitioner's counsel desires, which the Government thinks it is a matter that doesn't enter in the record at all except what is in the record that pertains to the petitioner. Colonel Peyton will explain the situation.

By Col. PEYTON. Your Honor, the petitioner has taken the position in this case that an exact copy only
73 of the order appointing the court in the case has been included in the record. However, actually the entire order appointing the court is contained in the record at the present time.

By the COURT. Where is that record? Was that in the copy of the court martial proceedings furnished the petitioner?

By Col. PEYTON. Yes, sir.

By the COURT. Have you had a copy of it, Mr. Cooper?

By Mr. COOPER. Your Honor, in the copy I obtained some time ago, it was not contained. Opposing counsel permitted me to examine this one last Wednesday, and I didn't find it in the papers. It may be there, but I was unable to find it, and if I have failed to do so, I would like to see it at this time.

By the COURT. You are asking me for a single paper?

My Mr. COOPER. For a single paper.

By the COURT. Have you a copy of the paper there?

By Col. PEYTON. Yes, sir.

By the COURT. Let him see it. While you are inspecting that, I will take up the others. You may go ahead.

By Mr. COOPER. This is the same one that was shown me, and I take the position it is merely an extract and not the complete order.

By the COURT. What do you say to that, Colonel?

By Col. PEYTON. Your Honor, we take the position
74 that this is the complete order appointing the court in this case. That is it.

By the COURT. Let me see. Is there any other order?

By Col. PEYTON. On that same date many other orders were published by that same headquarters, but they have nothing to do with this he presented here. Now that is the order.

By the COURT. It is marked "extract." What does that mean?

By Col. PEYTON. That means on that same date that same Headquarters published a great many orders, but that is the only order that pertains to the court martial. Each order that is published by Headquarters on a particular date is a complete order in itself. At that end of that—

By the COURT. I see this is marked special order number 273. This the complete and entire order?

By Col. PEYTON. That is the complete and entire order. With respect to the court martial, sir, may I illustrate that very hurriedly?

By the COURT. Yes.

By Col. PEYTON. For example, out at Fort McPherson whenever we have an army court martial, this is the order appointing that general court martial. Now on that same date, by Headquarters Third Army, many orders may be issued, but paragraph 18 of this order is the order appointing the court martial, and it is the only order.

By the COURT. That is what is copied here?

75 By Col. PEYTON. Yes, sir, that is the equivalent of it.

By the COURT. Well, it seems there is no such order as you are seeking, Mr. Cooper.

By Mr. COOPER. Your Honor, as I understand, the Commanding General signs one order, and there are numerous paragraphs to the order, and that's one of those paragraphs, numbered paragraph 2, it was included as an extract.

By the COURT. That's what he has just explained.

By Mr. COOPER. As I understand, the General signs one time, and that includes all these orders, as I understand it.

By the COURT. Have you the complete order there affecting this case, and other cases too?

By Col. PEYTON. No.

By the COURT. Have you a copy of it?

By Col. PEYTON. I have not got a copy here of all the orders published by the Headquarters Continental Base, September 7th, 1946, which is the date in question.

By the COURT. What is that other?

By Col. PEYTON. This is simply a sample of what is done, that. I have not got a copy of all the court-martial order, but that is this complete order in itself.

By the COURT. Why isn't it complete, Mr. Cooper?

By Mr. COOPER. It is referred to here in the copy as an extract.

By the COURT. He has just explained this is a general order covering numerous matters, and this particular
76 case is referred to as an extract from that general order on this page, as number , paragraph number 2.

By Mr. COOPER. Your Honor, here is the way it comes up. Honorable Kenneth Royal, Secretary of the Army, in a recent article in the Virginia Law Review, referred to the fact that at the time of the appointment of the court martial, it sometimes gives recommendations or suggestions in regard to how the case should be handled, just as the court will instruct a grand jury. Now it may be that in another extract of this order, this is one order of perhaps several pages long, which perhaps the General signed just one time, that related to the subject matter of this court martial. Whoever prepared this particular extract exercised judgment in deciding what was or was not relevant to this case. He may have decided it correctly, and he may have decided it incorrectly, and until the entire order is produced in court, that order that was signed at one time by the Commanding General, we are not in position to know at this time what the order was. This is merely an extract, according to what the record says.

By Col. PEYTON. That is the order appointing the court, and at the court-martial trial itself it says that the court met pursuant to that particular order, and that order that you have there was the order presented to the court martial at the time. That was the authority that the Trial Judge Advocate cited for the court convening. These other matters, that is counsel for petitioner might appear in the special order, but there is no ground for that, because there has never, to my knowledge, in accordance with the Army regulations that is not the proper subject matter for such special orders. By Army regulations special orders are
77 limited to matters relating to transfer of personnel, promotions, travel, details of appointment, and those things, there never were any instructions, as to special orders, as to

policy, how a general court martial should proceed, or in any way limiting or extending jurisdiction.

By the COURT. Does that general order you refer to have any other reference in it to the court-martial proceedings?

By Col. PEYTON. No.

By the COURT. Whether this or other court-martial proceedings?

By Col. PEYTON. Not on that same date. It is possible that another general court might be appointed, but that would have no relationship to this court.

By the COURT. Well, I think I will issue a rule in the case, and make it returnable, you can file an answer to the motion setting out those facts.

By Col. PEYTON. Yes, sir.

By the COURT. And if there is any other part of the general order which could in any way affect this case, you can produce that part of the general order. In other words, if there is any such provision in this order as referred to by Mr. Cooper which affected the handling and disposition of habeas corpus cases that ought to be set out. Or you may, in lieu of such a response, you may produce the order itself, or a certified copy of it.

By Col. PEYTON. Sir, the order itself is undoubtedly—that is a complete copy of all the orders issue by the Headquarters on that day. If we are to file a paper fifty or sixty pages long,
78 it would be a job to reproduce it, because it has absolutely nothing in it that affects this case, but we will prepare a statement—

By the COURT. Well, you can prepare a statement, an affidavit, to the effect that is what the general practice is and that there is nothing in this order affecting this, that could affect this case, except this paragraph which is quoted. You may prepare a rule to that effect.

Filed Jan. 4, 1949.

79 In United States District Court

Before: Honorable E. MARVIN UNDERWOOD, Judge

Sept. 28, 1948

Appearances: For the petitioner—WALTER G. COOPER, Esq.
For the Respondent—Col. H. M. PEYTON, JAGD; H. H. TYSINGER,
Asst. U. S. Attorney.

EUGENE PRESTON BROWN called on the Stand, having been sworn, testified as follows:

Direct examination by Mr. COOPER:

Q. When were you first taken into custody?

A. The night of December 25th.

Q. Speak a little louder so all of us can hear.

A. Night of December 25, 1946.

Q. Would you speak somewhat louder than that?

A. Yes, sir.

Q. By whom were you taken in custody?

A. By the MP's, Military Police.

Q. Military Police of the United States?

A. Yes, sir.

Q. At what hour of the day or night were you taken into custody?

80 A. About 8:30 in the afternoon.

Q. 8:30?

A. At night.

Q. At night. Were you taken after you were taken into custody?

A. Taken to MP Headquarters in Stuttgart, Germany.

Q. How long did you remain in custody at Stuttgart, Germany?

A. I stayed until the next day.

Q. Where were you taken then?

A. Taken back to my company, Esslingen, Germany.

Q. How far is Esslingen from Stuttgart?

A. Well, I was never sure, about six or seven miles, I guess.

Q. How long did you stay at Esslingen in custody?

A. Two nights.

Q. Where were you then taken?

A. Taken back to Stuttgart by the MP's.

Q. How long did you then stay at Stuttgart?

A. One night.

Q. In custody?

A. Yes, sir.

Q. Where were you then taken?

A. Mannheim Military Prison, Mannheim, Germany.

81 Q. Were you still in custody there?

A. Yes, sir.

Q. How long were you in custody?

A. I was in custody there, I was tried, the trial started on the 9th day of January, wound up on the 15th day of January.

Q. You were in custody until after the trial at Mannheim, Germany.

By the COURT:

Q. That January, 1947?

A. '47, yes, sir.

Q. January 9th to 15th?

A. Yes, sir.

Q. All right.

By Mr. COOPER:

Q. You first reached Mannheim what day?

A. I don't remember just what day it was, it was about the first of January, though.

Q. Now, when were you first interviewed with reference to the alleged offense of killing Private Josef Kowalsczyk?

A. Well, first time was in the guard box where this happened at.

Q. Who interviewed you there?

A. C. I. D.'s, Civilian Investigation Department.

82 Q. Do you know the name of the individual?

A. No, I don't remember the name.

Q. Did he take a written statement?

A. Taken a written statement from me, yes, sir.

Q. You signed it?

A. Yes, sir.

Q. Do you have a copy of it?

A. No, sir, I haven't.

Q. Were you ever given a copy of it?

A. No, sir.

Q. When were you next interviewed?

A. Next interviewed about two days after that, same place, same man.

Q. You were taken back to Stuttgart to be interviewed, to the guard box?

A. To Feuerbach, yes, sir.

Q. To what?

A. Feuerbach, Germany guard box.

Q. Is there any difference between Feuerbach and the guard box?

A. Feuerbach is a town, a little town of Feuerbach just on the outskirts of Stuttgart.

Q. You say you were taken back to the town of Feuerbach and interviewed?

A. Yes, sir.

83 Q. Were you taken to the guard box?

A. Yes, sir.

Q. That was a couple of days after the first interview?

A. Yes, sir.

Q. Who interviewed you there?

A. Same two men.

Q. Same two men?

A. Civilians, yes, sir, there were two of them.

Q. Do you know the names of either of the two?

A. I don't know the name of either one of them.

Q. Were they in civilian clothes, or uniform?

A. In civilian clothes.

Q. Did they identify themselves, both of them, as members of the Intelligence Service of the Army?

A. Yes, sir.

Q. Did they take a written statement on the second occasion?

A. No, sir, I don't believe they did, as well as I remember.

Q. Did you have an attorney present in either of those interviews?

A. No, sir.

Q. When were you next interviewed?

A. I was interviewed December 27th, I believe it was, at Battalion Headquarters at Esslingen.

84 Q. By whom were you interviewed?

A. Some major, I don't remember his name.

Q. Did you sign a written statement?

A. Yes, sir.

Q. I ask you to look at that photostatic copy of—which is page, marked one place 16 and one place 29, and another place, Exhibit A, which purports to bear your signature, and ask you if that appears to be a photostatic copy of a statement signed by you at that time?

By the COURT. Are you going to introduce the record?

By Mr. COOPER. I am going to introduce it for the purpose of attacking among other things—

By the COURT. You had better identify it.

(Court Martial Record marked for identification as "Petitioner's Exhibit #1".)

A. Yes, sir.

Q. This paper which I have shown you is a part of Petitioner's Exhibit Number 1, is it?

A. Yes, sir.

Q. In regard to the name of the Major who interviewed you, I ask you if it may or may not have been Major James G. Kleese, Major of the Ordnance Department, who I believe was the investigating officer?

A. I believe that was the name.

Q. At the time when you were interviewed by the Major to whom you have referred, did you have an attorney present?

85 A. No, sir.

Q. Was any one else present beside you and the Major?

A. A stenographer.

Q. Who? the—

A. The stenographer.

Q. Who was he?

A. The Major's stenographer.

Q. Oh, the Major's stenographer?

A. Yes, sir.

Q. He took down what you said?

A. Yes, sir.

Q. And he transcribed it and you signed it?

A. Yes, sir.

Q. Up to that time had you consulted any attorney?

A. No.

Q. Are you an attorney?

A. No, sir.

Q. Have you ever been an attorney?

A. No, sir.

Q. What, is anything, was said to you by the Major in the interview?

A. Well, he read me the Article from the Court Martial Manual, I guess it was, telling me my rights, that I could make a statement and not sign it or make one and sign it, or not make one, that they would be used against me if I did, something to that effect.

Q. And after hearing that statement you decided voluntarily to make a statement?

A. I did, yes, sir.

Q. What, if anything, did he say to you about a right on your part to examine or cross examine or have examined in your presence, the witnesses against you?

A. There wasn't anything said about it.

Q. Did he say anything whatever about witnesses?

A. No, sir, I didn't even know there was any witnesses at the time.

Q. Did you tell him anything about any witnesses that you might have?

A. No, sir.

Q. How long did the conversation last?

A. I would say around half an hour.

Q. Did he say anything to you about your right to counsel?

A. No.

Q. Did you say anything to him about counsel?

A. No, I didn't.

Q. When did you first see defense counsel?

A. I seen him some time in January before the trial, the—I don't remember the date, it was four or five days before the trial.

87 Q. That was the first time you saw him?

A. Yes, sir.

Q. Where did you see him?

A. In prison at Mannheim.

Q. Mannheim, Germany?

A. Yes, sir.

Q. Did you select him?

A. No, sir.

Q. Do you know who selected him?

A. The court did, I guess.

Q. He was assigned to your defense?

A. Yes, sir.

Q. Did you have more than one attorney?

A. I was supposed to have had more than one, but he was the only one there was.

Q. Were you ever interviewed by any other attorney?

A. No.

Q. Or any other defense counsel?

A. No, sir.

Q. Was any other defense counsel other than the one whom you have referred to, present at either day of the trial?

A. No, sir.

Q. Was your defense counsel an attorney-at-law?

A. I don't know, sir.

88 Q. How long did the interview with your counsel last?

A. The one in prison?

Q. Yes.

A. About two or three minutes.

Q. What did he say to you?

A. He just told me when the trial was scheduled for, and that he had been appointed my defense counsel.

Q. What did you say to him?

A. I didn't say anything.

Q. Did he ask you anything about what witnesses you might have?

A. No, sir.

Q. Did he ask you what defense you had?

A. No, sir.

Q. Did you tell him anything about any witnesses?

A. No, I didn't have any.

Q. Did you tell him anything about what defense you might have?

A. No, sir.

Q. Why was it that you did not name any witnesses, or tell him about any defense?

A. There wasn't any witnesses I had. There wasn't anybody there, but, that had seen it, but me, what happened.

Q. Did you tell him about—

89

By the COURT:

Q. What became of the young lady? She left before the —

A. No, sir, she was in the guard box, but she couldn't see what went on.

By Mr. COOPER:

Q. Did you have any other interview with your counsel before the first day of the trial?

A. No, sir.

Q. How long before the trial commenced did you and he start conferring?

A. About fifteen minutes, I guess.

Q. About fifteen minutes before the trial commenced?

A. Yes, sir.

Q. Where was that?

A. That was in the Mannheim, in the court, Mannheim, in the court room.

Q. What happened at that time, what did he say to you, and what did you say to him?

A. I don't remember now, just exactly what. There wasn't very much of anything said.

Q. Why was it that you didn't discuss with him the merits of the case at that time?

A. Well, he didn't say anything about them, and I didn't know anything to tell him.

Q. Did you have any conversation with him about the handling of the case?

90

A. No.

Q. After the close of the first day of the hearing?

A. No, sir.

Q. Or between that, between the close of the hearing of the first day up to the time of the beginning of the hearing on the second day? The 14th, I believe?

A. No, sir.

Q. Did you have a conference with him on the 14th, in advance of the beginning of that day of the hearing?

A. No, he come in and started reading the newspaper and stayed in court, and that was all there was to it.

Q. How many attorneys represented the prosecution?

A. Two.

Q. Do you know whether or not they were attorneys-at-law?

A. No, sir, I do not.

Q. Did you have any written communications to or from your counsel at any time?

A. No, sir.

Q. Did he file any brief or appearance or present any argument in your behalf to the Staff Judge Advocate after the trial, or to the Board of Review, or to the Office of the Judge Advocate General in Washington?

A. Not that I know of.

Q. Were you furnished a copy of the record of trial?

A. Yes, sir.

91 Q. When were you furnished that?

A. Some time after the trial, about a week, or something like that.

Q. That was while you were still in Germany?

A. Yes, sir.

Q. Did you bring that record back with you to the United States?

A. No, sir.

Q. Were you furnished with any copy of the review by the Staff Judge Advocate?

A. No.

Q. Or the review by the Board of Review?

A. I got a statement from one saying 50½ Article of War had been complied with, and my sentence from life wasn't approved, but twenty years was approved, something like that.

Q. When did you receive that?

A. I was still in Germany; I don't remember the date.

Q. Was there anything in the way of an opinion and listing the evidence or the trial in this communication to you?

A. No, sir.

Q. Did you ever receive a copy of the opinion or the review in the Office of the Judge Advocate General in Washington?

A. No, sir.

92 Q. Have you seen a copy of the opinion by the Board of Review?

A. Nothing except that 50½ Board.

Q. That notice you referred to?

A. Yes, sir.

Q. Have you ever received a copy of the opinion of the Judge Advocate General's office in Washington?

A. No, sir.

Q. Did Captain Noel, the Company Commander, ever interview you about the case?

A. No, sir.

Q. As far as you know, did he conduct any investigation of the case?

A. Not that I know of.

Q. Did you ever—well, before you came back to the United States, did you ever hear of Captain Robert E. Byrne, Captain, Judge Advocate General's Department?

A. No, sir.

Q. Assigned to Continental Base Headquarters, Bad Neuheim, Germany?

A. No, sir, never heard of him.

Q. Did you ever hear of Captain Gerald A. Sams, Captain, Judge Advocate General Department, assistant trial judge advocate at the Continental Base Section at Bad Neuheim, Germany?

A. No, sir.

93 Q. Did either of those officers, Captain Byrne or Captain Sams, as far as you know, conduct any investigation of your case?

A. Not as far as I know, sir.

Q. What was your answer?

A. Not as far as I know, sir.

Q. Were you ever shown a copy of the pretrial investigation report?

A. I—

Q. Before you came to this country?

A. No, sir.

Q. Were you ever shown a copy of the autopsy report of Captain Robert J. Brimi?

A. Yes; I was shown that the day of the trial.

Q. By whom?

A. By Captain Kane.

Q. Who is he?

A. He is the judge advocate general.

Q. He was the trial judge advocate?

A. Trial judge advocate, yes, sir.

Q. How did he happen to show it to you?

A. Well, he asked me if I, to read it, and something or another about whether we would want, have to bring this man that done it, the captain, whatever he was, that had to do the work, there wasn't any use in just passing it, wouldn't have him there for a witness.

Q. I'm sorry, I can't hear all that you say.

94 A. He showed it to me and told me if I would agree to it, to what was on the paper, that we wouldn't have that captain there for a witness, wouldn't have to call him.

Q. Did you ever see any of the statements signed by any other witness prior to the trial or during the course of the trial?

A. No, sir.

Q. Who was the interpreter at the trial?

A. I don't know, sir, some German girl.

Q. Do you speak German?

A. No, sir.

Q. Do you speak Polish?

A. No.

Q. You understand either of those languages?

A. No, sir.

Q. Did your counsel speak German?

A. I don't know, sir.

Q. Did he speak Polish?

A. I don't know, sir.

Q. Who was Sergeant Henderson?

A. He was, Henderson was sergeant of the guard down at this motor pool.

Q. Was he in charge of the guard of which you were a member?

95 A. He was in charge, yes, sir. I was in charge a while, one day, and him the next, then we got short a guard, so I started pulling guard.

Q. Did he have anything to do with the investigation of the evidence, or was he a witness?

A. No, sir, the only thing that I told him, not to let nobody get the bottle that the Pollock tried to hit me with, that was in the guard box.

Q. When did you tell him that?

A. I told him that when they took me back to this division investigating up there.

Q. The first or second, that was the second interview, then wasn't it, by the civilian?

A. First interview.

Q. First interview?

A. Yes, sir.

Q. That was on the night of December 25th, 1946?

A. No, it was the day of December 26th.

Q. And Sergeant Henderson was told by you them, what, about the bottle?

A. I told him not to let nobody move it, let it stay there where it was.

Q. What did he say?

A. He said all right.

Q. Was he at the trial?

A. No.

Q. Why not?

96 A. I think he had come back to the States.

Q. Was there anything else that you wanted him to testify to besides the bottle?

A. No, sir.

Q. Was the bottle produced at the trial?

A. No, sir.

Q. Was there any reason given to you why it was not produced?

A. No, sir.

Q. Do you know of any general orders that applied to you as a sentry in your duties while you were a sentry on duty?

A. Yes, sir.

Q. What was it?

A. All my general orders.

Q. Could you state which of those applied to your duties as a sentry?

A. All of them.

Q. Could you state them for the record? Do you know them?

A. First one is take charge of this post and all government property in view. Second is, walk my post in military manner, keeping always on the alert and have everything that took place in sight of, or hearing. Third one is, I have about forgotten them. Third one was, call the corporal of the guard for anything not covered by instructions. Fourth one, give alarm in case of fire or disorder. Fifth one was quit my post only when properly relieved. Sixth one, receive, obey and pass on to the sentry on relief all orders and acknowledge the commanding officer of the guard only, seven is talk to no one except in line of duty, I think I got one mixed up. The eighth one was, I don't remember now what the eighth one is. Report all violations of orders. Nine was, I don't remember what the ninth one is. Tenth one is salute all officers and all colors and standards. Eleventh one, be specifically watchful at night during the time of challenge, and challenge all persons on or near my post, not allowing them to pass without proper authority.

Q. How large a man was Sergeant Franz Olschewski?

A. I would say somewhere around a hundred fifty-five pounds.

Q. How old a man was he?

A. Twenty-six or twenty-seven.

Q. How large a man was Private Josef Kowalsczyk?

A. About a hundred sixty or sixty-five pounds.

Q. How old a man was he?

A. He looked to be, well, I didn't see him much, about twenty or twenty-two years old.

Q. Was any one else on guard duty that night at the guard box itself, beside you?

A. No, sir.

Q. Was any one else on guard in the motor pool beside you that night?

A. Yes, sir.

Q. Who?

98 A. Polish guards.

Q. How many?

A. I don't know how many.

Q. How far were they stationed from your station?

A. They were in the area behind mine. They walked around the area.

Q. How large an area was the motor pool?

A. I would say it was across to, half an acre of ground.

Q. Was it square or rectangle or round, what shape was it?

A. It was square.

Q. Was it vacant property, or have buildings there?

A. Had buildings all through it.

Q. What type of buildings?

A. Maintenance shop, buildings where the officers was, our living quarters, German mess hall, that is all the buildings I ever was in.

Q. How many people work there during the day?

A. I don't know, about a hundred, or a hundred and fifty, I guess.

Q. How many vehicles were there?

A. Well, some times there was more than others. There was, I guess, twenty-five or thirty.

Q. Did any of those Polish guards who were on duty that night come to your station when the shot was fired?

A. No, sir.

99 Q. Did that guard box you are referring to, will you describe it?

A. Well, it was the body of a maintenance truck, about seven by twelve feet, by twelve feet—seven feet wide and twelve feet long, about six and a half feet high, I guess.

Q. Was the floor of that body level with the ground, or above the ground, or below it?

A. No, sir, it was about fifteen or eighteen inches off the ground.

Q. Above the ground?

A. Yes, sir.

Q. Referring again to the trial, how long a speech did the trial judge advocate, that's the counsel for the prosecution, make?

A. About five or ten minutes, I guess.

Q. Did more than one speaker speak for the prosecution?

A. No, sir, just one.

Q. How long a speech did your counsel make?

A. About the same length of time.

Q. What points did he present to the court martial in his speech?

A. I don't remember now, just what they were.

Q. Do you remember any of them?

A. Well, one of them was about telling this Pollock sergeant, telling those tales about how the thing happened, I don't remember just exactly what there was.

100 Q. Did he say anything about your duties as a sentry?

A. I don't remember.

Q. What's that?

A. I don't remember.

Q. Did he say anything about whether or not it was your duty to stand your ground or to retreat when attacked?

A. I don't remember just what was said.

Q. Now——

By the COURT:

Q. What education have you had?

A. I had first year in high school.

Q. What?

A. First year in high school.

Q. First year?

A. Yes, sir.

Q. I see.

By Mr. COOPER:

Q. At the time of the, either date of the trial, did you know that the law member of the court was not a member of the Judge Advocate General Department?

A. No, sir.

Q. When did you first learn he was not a member of the Judge Advocate General Department?

A. I learned it, you told me the other day he wasn't was the first time I knew it.

101 Q. I was the first one that told you that?

A. Yes, sir.

Q. Was there a man in the Army that could speak German?

A. Yes, sir.

Q. Could he speak it well?

A. Yes, sir.

Q. Were there many in the Army who could speak Polish?

A. Yes, sir.

Q. Could they speak it well?

A. Yes, sir.

Q. Were those men in Germany near Esslingen, or Stuttgart, or Mannheim?

A. There were men in my own company who could speak both German and Polish.

Q. Speak it well?

A. Yes, sir.

Q. Well—

A. Two boys in there I know of was born in Germany.

Q. As far as you know, was there ever any investigation of whether or not there were fingerprints on Private Josef Kowalsczyk on that whiskey bottle?

A. Not as far as I know.

Q. As far as you know was there an investigation ever made in regard to whether or not Sergeant Olschewski or
102 Private Kowalsczyk had been drinking upon the evening of December 25th, 1947—1946?

A. There wasn't.

Q. Or during that day?

A. There wasn't, as far as I know.

Q. As far as you know, was there ever an investigation as to whether either of them were violent and quarrelsome in disposition?

A. Not as far as I know.

Q. As far as you know was there any investigation in regard to whether or not the Polish guards stationed at the motor pool were violent, quarrelsome, and difficult to handle?

A. As far as I know, there wasn't.

Q. As far as you know was there ever an investigation of the clothing of Private Kowalsczyk to determine whether the shot was fired from a very close range?

A. Not that I know.

Q. As far as you know was there any interrogation of other witnesses who came to the scene other than Private Stone, Private Oaks, Sergeant Owlschewski, and Elisabeth Rehm?

A. That is all I know of.

Q. Was there an interrogation during the investigation of the military police who took you into custody?

A. I don't know.

Q. Was there ever any interrogation of the police who took Elisabeth Rehm in custody as far as you know?

103 A. Not that I know of.

Q. Was there any interrogation of the police who either interviewed or took into custody Sergeant Owlschewski?

A. I don't know.

Q. As far as you know was there any interview of any of the hospital personnel who treated the deceased?

A. No, sir, I do not know.

Q. That is all at this time. He is with you.

By Col. PEYTON. Your Honor, the respondent does not care to cross examine Brown.

By the COURT. You may go down.

(Whereupon the petitioner was excused from the stand.)

Filed Dec. 29, 1948.

Opinion and order sustaining writ and discharging petitioner

Filed Nov 17, 1948

On January 14, 1947, petitioner was, after trial and conviction, sentenced by a General Court-Martial sitting at Mannheim, Germany, to life imprisonment upon the charge of murder.

The finding of guilty was by a two-thirds vote of the members present and the sentence was imposed by a vote of three-fourths of the members of the Court present at the time the vote was taken. The findings and sentence were duly approved by the Board of Review and the sentence was later reduced to a term of twenty years.

Petitioner alleges as grounds for writ habeas corpus that the Court-Martial was without jurisdiction and its sentence void because the Court was not legally constituted; that the sentence of the Court was invalid because based upon findings of guilty by only two-thirds instead of three-fourths of the members of the Court, and because the pretrial investigation was not thorough and impartial as required by the 70th Article of War; that petitioner was not afforded effective assistance of counsel; that the only pretrial investigation made was that under the charge of manslaughter and not of murder; and that the only investigation made by the duly appointed investigator was not based upon his own investigation but upon statements previously procured by others.

The first ground raises the crucial question in this case. It is contended that the Court was not legally constituted because the law member thereof was not an officer of the Judge Advocate General's office as required by the 8th Article of War.

This Article contains the following provision:

"The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specifically qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe."

The record shows that the member of the court designated as law member was not an officer of the Judge Advocate General's Department. The order establishing the Court-Martial shows on its face that Captain Jack H. Chalkley, who was detailed as

Assistant Trial Judge Advocate, was an officer of the Judge Advocate General's Department.

A court-martial is purely a creature of the statute and has only such powers as delegated to it by the statute. There is no presumption of jurisdiction in its favor, and unless constituted as provided by law, is not a legal court and has no jurisdiction to try offenders brought before it.

Restrictions on the jurisdiction of courts-martial have been repeatedly emphasized by the United States Supreme Court, as will be seen from the following quotations:

106 "But, the court-martial being a special statutory tribunal, with limited powers, its judgment is open to collateral attack, and unless facts essential to sustain its jurisdiction appear, it must be held not to exist." (*Collins v. McDonald*, 258 U. S. 416, 418).

"Undoubtedly courts-martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack. True, also, is it that in consequence of the limited nature of the power of such courts the right to have exerted their jurisdiction, when called in question by collateral attack, will be held not to have existed unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion and therefore were or should have been a part of the record." (*Givens v. Zerbst*, 255 U. S. 11, 19).

"To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings has been complied with, and that its sentence was conformable to law. *Dynes v. Hoover*, 20 How. 65, 80; *Mills v. Martin*, 19 Johns. 33. There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require, that averment of jurisdiction shall be positive—

107 that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.'

All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively." (*Runkle v. United States*, 128 U. S. 543, 556).

It will be observed that the Supreme Court, in the *Runkle* case, *supra*, held expressly that "it must appear affirmatively and unequivocally that the court was legally constituted." (Page 556.)

In *McClaghry v. Deming*, 186 U. S. 49, the Supreme say, "A court-martial is the creature of the statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." (Page 62.) "To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. * * * There are no presumptions in its favor, so far as these matters are concerned. * * * The fact necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively." (Page 63.)

108 Congress evidently felt, especially in serious cases like the present one, that it was necessary for the protection of the accused and also of the public interest, that a lawyer with the experience derived from service in the Judge Advocate General's Department, should sit in every court-martial case and expressly made this a condition precedent to the validity of such court-martial, except in the single instance where such officer was not available. No discretion whatever was given the appointing authority where such an officer was available. Where, as here, the record shows that such officer was not only available but was actually appointed to another position on the court, and no reason whatever is shown by the record or extrinsic evidence why he was not detailed as the law member, there is a direct violation of one of the most important requirements of the law for the establishment of a legal court-martial. Since the law requires that jurisdictional facts must affirmatively appear, either by the order establishing the court, or by extrinsic evidence in order to establish the jurisdiction of the court-martial, the burden of proving such facts rests upon the party asserting the existence of such necessary jurisdictional facts. (*Ver Mehren v. Sirmyer* (C. C. A. 8) 36 F. 2d 876, 880). (See also, *Givens v. Zerbst*, *supra*.)

Finding as I do that the appointment of an officer of the Judge Advocate General's Department as the law member of the court was an essential jurisdictional fact and that it does not appear from the order establishing the court-martial or by any other evidence that such officer was not available, but on the other hand, that the order shows that such officer was available, I conclude that the court-martial was illegally constituted and therefore had

no jurisdiction over the person or offense and that petitioner should be discharged.

109 This conclusion determines the case, but I will add that the record establishes the fact that the 70th Article of War was substantially complied with in the pretrial investigation as was also the 43rd Article of War. With respect to the latter it will be noted that in this case, while the death penalty might have been imposed, it was not mandatory and that therefore the vote of "three-fourths of the members present at the time the vote was taken concurring" was sufficient to support the sentence, although the finding of guilty was by a vote of two-thirds of the members present. (*Stout v. Hancock* (C. C. A. 4) 146 F. 2d 741, certiorari denied 325 U. S. 850). The other grounds for habeas corpus alleged are without merit.

Whereupon, it is considered, ordered and adjudged that the writ of habeas corpus be, and the same hereby is, sustained, and that respondent discharge petitioner from custody at the end of twenty (20) days from this date, unless a further supersedeas be granted by this Court, such delay being allowed to afford opportunity for appeal if desired.

This November 17, 1948.

E. MARVIN UNDERWOOD,
United States District Judge.

110

In United States District Court

Notice of appeal

Filed Dec. 2, 1948

Notice is hereby given, with the authority of the Attorney General of the United States, that William H. Hiatt, Warden of the United States Penitentiary, Atlanta, Georgia, as respondent in the above entitled proceeding, in which the said Eugene Preston Brown is the petitioner, appeals to the Fifth Circuit Court of Appeals of the United States from the opinion and Order sustaining the writ of habeas corpus entered November 17, 1948.

This 2nd day of December, 1948.

J. ELLIS MUNDY,
United States Attorney.

HARVEY H. TYSINGER,
Assistant United States Attorney.

NOTE: Service omitted.

WALTER G. COOPER,
Attorney for Petitioner, Counsel of Record.

111

In United States District Court

Notice of cross-appeal

Filed Dec. 3, 1948

The Respondent in the District Court, having on December 2, 1948, served upon the attorney for the Petitioner in the District Court a Notice of Appeal, and the notice having been filed in the District Court, the said petitioner now gives notice that he, Eugene Preston Brown, as Petitioner and Appellee in said proceedings, cross-appeals to the United States Court of Appeals for the Fifth Circuit from all those portions of the findings, opinion, order and judgment of the District Court in this case rendered November 17, 1948, that were not in his favor.

This the 3rd day of December, 1948.

WALTER G. COOPER,
Attorney for Eugene Preston Brown.
ANDREWS & NALL,
Of Counsel for Eugene Preston Brown.

112

In United States District Court

Application for enlargement upon recognizance with surety

Filed Dec. 2, 1948

To the Honorable E. MARVIN UNDERWOOD, Judge of the United States District Court, Northern District of Georgia:

The petition of Eugene Preston Brown respectfully shows:

1. On November 17, 1948, in the opinion and judgment in this case sustaining the writ of Habeas Corpus, it was provided:

"Whereupon, it is considered, ordered and adjudged that the writ of habeas corpus be, and the same hereby is, sustained, and that respondent discharge petitioner from custody at the end of twenty (20) days from this date, unless a further supersedeas be granted by this Court, such delay being allowed to afford opportunity for appeal if desired.

"This November 17, 1948.

(s) E. MARVIN UNDERWOOD,
United States District Judge.

2. The respondent, William H. Hiatt, Warden of the United States Penitentiary, Atlanta, Georgia, filed in this case an appeal to the United States Court of Appeals for the Fifth Circuit on December 2, 1948.

3. Pursuant to Rule 33 of the United States Court of Appeals for the Fifth Circuit, Eugene Preston Brown, the petitioner and appellee, hereby applies for enlargement upon recognizance in the amount of One Thousand (\$1,000.00) Dollars with surety.

4. Petitioner is a resident of North Carolina and desires to submit a surety from North Carolina.

Wherefore, petitioner applies for an order for an enlargement upon recognizance as indicated above.

WALTER G. COOPER,
Attorney for petitioner.

ANDREWS & NALL,
Of Counsel for Petitioner.
NOTE: Service omitted.

114 In United States District Court

Order on application for bail pending appeal

Filed Dec. 3, 1948

An appeal having been taken to the United States Court of Appeals for the Fifth Circuit in the above matter, and application having been made to the undersigned Judge of this United States District Court for the Northern District of Georgia for bail pending appeal, upon considering the application.

It is ordered that bail be granted and fixed at the sum of One thousand (\$1,000.00) Dollars, the bond being conditioned to appear to answer the judgment of the said Court of Appeals in the above stated matter.

It is further ordered that the surety on the bond may justify and the bond be approved by and before the Clerk of the United States District Court for the Northern District of Georgia or before a United States Commissioner in the State of North Carolina, or before the United States Commissioner at Atlanta, Georgia.

This the 3rd day of December, 1948.

E. MARVIN UNDERWOOD,
United States District Judge.

No objection to the above order.

HARVEY H. TYSINGER,
Assistant U. S. Attorney.

115

In United States District Court

Bond on appeal

Filed Dec. 6, 1948

Know All Men By These Presents that we, Eugene Preston Brown, Principal, and Marion R. Chipley and Wife, Gertrude B. Chipley, Surety, are held firmly bound into the United States in the sum of One Thousand (\$1,000.00) Dollars, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Signed, sealed and dated this 2nd day of December 1948.

Whereas, lately William H. Hiatt, ~~Warden~~, United States Penitentiary, Atlanta, Georgia, has taken an appeal to the United States Court of Appeals for the Fifth Circuit in the above stated habeas corpus proceeding and application having been made by the petitioner, Eugene Preston Brown, for enlargement upon recognizance bond pending the action of the said Court of Appeals in said proceeding, and the Court having entered an order fixing the bond at One Thousand Dollars, the bond to be conditioned to appear to answer the judgment of said Court of Appeals in the above stated matter.

— Now the condition of this obligation is such that the said Eugene Preston Brown shall obey all orders made by United States Court of Appeals for the Fifth Circuit in said cause and shall surrender himself in execution of any judgment that may be entered by the said United States Court of Appeals then this obligation to be void else to remain in full force virtue and effect.

116 Given under the hand and seal of each of the undersigned.

[SEAL]

EUGENE PRESTON BROWN,
Principal.

Signed, sealed and executed as to Principal before me on the 2nd day of December 1948.

[NOTARY SEAL]

MACON BARBEE,

Notary Public, Georgia, State at Large.

My Commission Expires July 31, 1950.

(Page two of Appeal Bond of Eugene Preston Brown in the United States District Court for the Northern District of Georgia in the amount of One Thousand Dollars.)

Signature of Surety:

[SEAL]

Surety:

MARION R. CHIPLEY.
GERTRUDE B. CHIPLEY.

Signed, sealed and executed before me as to Surety on the 4th day of December 1948.

I approve the sufficiency and suitability of the said surety for this bond.

[SEAL]

NAT. C. WHITE,

U. S. Commissioner at Charlotte, N. C.

(File endorsement omitted.)

117

In United States District Court

Stipulation re documentary evidence

Filed Dec. 3, 1948.

It is agreed and stipulated between counsel for the appellant and counsel for the appellee that the entire documents, being the certified photostatic court-martial proceedings, including, among other things, the pre-trial investigation and any other documentary evidence introduced in evidence in the above-styled habeas corpus proceeding, be and remain in the Office of the Clerk of the District Court for the use of counsel in the preparation of briefs to be filed until twenty (20) days before the appeal is assigned on the calendar for argument and, at that time, be by the Clerk of the District Court forwarded forthwith to the Clerk of the Court of Appeals as physical exhibits in the record on appeal.

This 3rd day of December, 1948.

J. ELLIS MUNDY,

United States Attorney,

HARVEY H. TYSINGER,

Assistant United States Attorney,

Counsel for Appellant.

WALTER G. COOPER,

Counsel of Record for Appellee.

ANDREWS & NALL,

Of Counsel of Record for Appellee.

118

In United States District Court

Statement of points on appeal

Filed Dec. 14, 1948

The Court erred in its opinion and order sustaining the writ of habeas corpus in holding that the general court-martial that tried petitioner was illegally constituted and therefore lacked jurisdiction to proceed because the law member was not a member of

the Judge Advocate General's Department while a member of that Department was appointed as Assistant Trial Judge Advocate on the order establishing the court:

(a) Because the court erred in not accepting the appointing authority's determination as to the availability of members of the Judge Advocate General's Department to sit on the court-martial that tried petitioner;

(b) Because the court erred in construing as mandatory rather than directory the provisions of Article of War 8 (10 U. S. C. A. 1479) pertaining to detail of a member of the Judge Advocate General's Department as law member on a court-martial.

14 Dec. 1948.

J. ELLIS MUNDY,

United States Attorney,

HARVEY H. TYSINGER,

Assistant United States Attorney,

Colonel EUGENE M. CAFFEY,

Judge Advocate General's Department.

Lieutenant Colonel H. M. PEYTON,

Judge Advocate General's Department,

Counsel for Appellant.

119

120

In United States District Court

Statement of points on cross-appeal

Filed Dec. 9, 1948

1. An Army Court-Martial conviction for murder requires at least a three-fourths vote of the members of the Court.

2. The order appointing the Court-Martial 7 December 1946 did not refer to future cases, only to cases then pending. Since the alleged offense occurred December 25, 1946, it was not within the jurisdiction of the named Court-Martial.

3. Only an extract from the order appointing the Court-Martial is in the Record of Trial, and no other portion of the order was introduced at the Court-Martial or at the Habeas Corpus trial. The other portions of the order may have affected, restricted or defined the jurisdiction of the Court-Martial, or its conduct or procedure. Therefore jurisdiction to try the case of petitioner was lacking and was never shown to exist. This is a fatal defect in a proceeding before a tribunal of special or limited jurisdiction, such as a Court-Martial.

4. The Record of Pretrial Investigation shows that the indispensable jurisdictional requirements of the 70th Article of War were not complied with, in that the pretrial investigation was neither impartial nor thorough, and little of it was con-

121 ducted by the Investigating Officer. There was no substantial compliance with the requirements in regard to pretrial investigation.

5. The evidence at the Habeas Corpus hearing shows that the indispensable jurisdictional requirements of the 70th Article of War were not complied with, in that the pretrial investigation was neither impartial nor thorough.

6. The pretrial investigation consisted principally of brief reports of interviews that had been transmitted with the charge and specification to the Investigating Officer upon his appointment. No other pretrial investigation was conducted except an interview with the accused.

7. The prosecution witnesses were not interviewed in the presence of the accused before the trial, nor did he waive this right that is fundamental in military law and under the Articles of War. This is a jurisdictional defect.

8. In the pretrial investigation, the accused was not told the names of the witnesses against him, nor told of his right to present anything he might desire in his own behalf, except that he was allowed to make his own statement.

9. The several errors and deficiencies of the pretrial investigation were particularly serious in military law because the
122 accused has no opportunity to investigate nor can any investigation in his behalf be conducted in a military establishment except by authority of the Commanding Officer. The lack of a thorough and impartial pretrial investigation is so serious in military law that it is a denial of due process of law.

10. After the pretrial investigation, the charge of manslaughter was marked out and a new charge of murder was instituted. The accuser signing the new charge of murder did not sign the required oath that he had personal knowledge of or had investigated the matters set forth in the charge. He had no such knowledge, and had not investigated.

11. There was never any purported pretrial investigation of the charge of murder, but only a charge of manslaughter. Material issues in a murder trial were not investigated. This is a jurisdictional defect.

12. The requirement of counsel for the defense was not substantially complied with.

13. There was in the record of the Court-Martial trial no evidence of murder, and not sufficient evidence of manslaughter to convince beyond a reasonable doubt.

14. The autopsy report, most important evidence in favor of the accused, was not offered in evidence. A stipulation much less favorable to the accused was introduced instead of the autopsy report.

123 15. The record of an interview with the chief prosecuting witness which was furnished to Defense Counsel was inaccurate.

16. The interpreter was an enemy alien. United States citizens qualified to be interpreters were available. The principal prosecution witnesses testified in languages not known by the accused.

17. The reviews by the Staff Judge Advocate, the Board of Review and the Judge Advocate General and apparently the Court-Martial itself overlooked the defense that the accused was a sentry on guard duty and fired the fatal shot in the bona fide belief that it was his duty as a sentry to fire it, and to fire it in the manner that he did. The case of *In re Neagle*, 135 U. S. 1, was not mentioned in the reviews.

18. The reviews by the Staff Judge Advocate, the Board of Review and the Judge Advocate General and apparently the Court-Martial itself proceeded upon the theory that a person under attack must "retreat to the wall" before shooting in self-defense. The repudiation of that theory by the decisions of *Brown v. U. S.*, 256 U. S. 335, *Beard v. U. S.*, 158 U. S. 550, and *Rowe v. U. S.*, 164 U. S. 546, was not considered. This error, under the case of *Bridges v. Wixon*, 326 U. S. 135, and other authorities and principles, was proper ground for sustaining the writ of Habeas Corpus.

124 19. The fact that said reviews did not consider these two points of controlling significance, the fact that these reviews did not evaluate the autopsy report and did not set forth the fact that there was no evidence of murder, and not enough evidence of manslaughter to convince beyond a reasonable doubt, constituted a failure to comply with the indispensable jurisdictional requirements of the statutes in regard to Court-Martials, particularly the Article of War Number 501½.

20. These reviews were similarly a denial of due process of law.

21. These reviews were so inadequate that they did not comply with the jurisdictional requirements of the statutory Articles of War.

22. Similarly, the inadequacy of these reviews was a denial of due process of law.

23. The totality of errors of the entire proceedings constituted a denial of due process of law.

Respectfully submitted.

WALTER G. COOPER,

Attorney for Eugene Preston Brown, Appellee.

ANDREWS & NALL,

Of Counsel for Appellee.

NOTE: Service omitted.

In United States District Court

Supplementary statement of points on cross-appeal

Filed Dec. 16, 1948

24. The finding that the 70th and 43rd Articles of War were substantially complied with is, in the contention of Appellee, erroneous and contrary to the evidence and without evidence to support it.

25. It is contended by appellee that the statement on page 6 of the opinion, "The other grounds for habeas corpus alleged are without merit," is erroneous, contrary to evidence and contrary to law.

26. Those paragraphs of the petition that were denied upon information and belief are to be taken as true, at least to the extent that such information is within the knowledge or control of the Department of the Army or the Department of Justice.

27. The facts sought in the Requests for Admissions, except to the extent denied categorically under oath, are to be taken as admitted.

Respectfully submitted.

WALTER G. COOPER,
Attorney for Appellee.

ANDREWS & NALL,
Of Counsel for Appellee.

NOTE: Service omitted.

In United States District Court

Supplementary statement of points on cross-appeal

Filed Dec. 23, 1948

28. The petitioner's Motion for production of documents ought to have been granted.

WALTER G. COOPER,
Attorney for Appellee.

ANDREWS & NALL,
Of Counsel for Appellee.

NOTE: Service omitted.

In United States District Court

Designation of record on appeal

Filed Dec. 14, 1948

Comes William H. Hiatt, Warden, United States Penitentiary, appellant in the above styled cause, and, in compliance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, designates the complete record and all proceedings and evidence in this action in the United States District Court, Northern District of Georgia, as the record, proceedings and evidence in this action to be contained in the record on appeal to the Circuit Court of Appeals, Fifth Circuit, the designation being as follows:

1. Petition for Writ of Habeas Corpus;
2. Order for Respondent to Show Cause Why Petition for Writ of Habeas Corpus Should Not Be Granted;
3. Return of Respondent, together with Exhibits thereto, and Order Permitting traverse;
4. Traverse of Respondent's Return;
5. First Amendment to Petition and Order Allowing Amendment;
6. Return of Respondent to First Amendment;
7. Petitioner's Traverse of Return of Respondent to First Amendment to Petition;
8. Second Amendment to Petition and Order Allowing Second Amendment;
9. Return of Respondent to Second Amendment to Petition;
- 128 10. Third Amendment to Petition and Order Allowing Amendment;
11. Return of Respondent to Third Amendment to Petition;
12. Order that the Writ of Habeas Corpus Issue;
13. Writ of Habeas Corpus Returnable September 28, 1948 and delivered to United States Marshal;
14. United States Marshal's Return to Writ of Habeas Corpus;
15. Complete Transcript of the Hearing on September 20, 1948, before the Federal District Court certified by the court reporter as to correctness;
16. Photostatic copy of the Record of General Court-Martial Trial and Proceedings in the case of Eugene Preston Brown, introduced in evidence at hearing before Federal District Court;
17. Complete Transcript of the Hearings before District Court on September 28 and 29, 1948, exclusive of oral argument of coun-

sel for petitioner and respondent, certified by court reporter as to correctness;

18. Opinion and Final Judgment, dated November 17, 1948, sustaining the Writ of Habeas Corpus and discharging petitioner from custody of respondent;

• 19. Notice of Appeal by Respondent;

20. This Designation of Record on appeal;

21. All other portions of the Record, Proceedings and Evidence in this action as may have been omitted from the foregoing specific designations, it being the intention of the appellant to designate the complete record and all of the Proceedings and Evidence in this action as the Record, Proceedings and Evidence to be contained in the record on this appeal.

J. ELLIS MUNDY,

United States Attorney,

HARVEY H. TYSINGER,

Assistant United States Attorney,

Colonel EUGENE M. CAFFEY,

Judge Advocate General's Department,

Lieutenant Colonel H. M. PEYTON,

Judge Advocate General's Department,

Counsel for Appellant.

NOTE: Service omitted.

130

In United States District Court

Appellee's designation of additional portions of the record on appeal

Filed Dec. 23, 1948

1. Letter of 6/7/48, petitioner's exhibit 2.
2. Letter copy 5/30/48, petitioner's exhibit 3.
3. From the Basic Field Manual, Interior Guard Duty, FM 26-5, the following:

On page 14 thereof, the General Orders 1 to 11, inclusive.

On pages 14 and 15 thereof, Regulations Relating to—

General Orders, Number a. No. 1

Number c. No. 3 on page 15

Number (3) on page 27.

The rest of this exhibit need not be copied in the record, or this entire exhibit may be transmitted instead of being copied.

4. Notice of Cross-appeal.

5. Statement of Points on Cross-Appeal.

6. Both Supplementary Statements of Points on Cross-appeal.

7. This Designation of Additional Portions of the Record.
8. Motion for production of documents.
9. Petitioner's Requests for Admissions served 9/13/48.
10. Respondent's Reply to Request for Admissions.
- 131 11. Interrogatories to Respondent.
12. Respondent's Objection and Answer to Interrogatories.

Respectfully submitted.

WALTER G. COOPER,
Attorney for Appellee.

ANDREWS & NALL,
Of Counsel for Appellee.

NOTE: Service omitted.

132 In United States District Court
Order designating physical exhibit

Filed Dec. 17, 1948

At the hearing in the above-entitled cause, there was introduced in evidence as "Petitioner's Exhibit No. 1," the entire record of the Court-Martial Proceedings, upon which petitioner was convicted and sentenced, said record being an authenticated photostatic copy from the file of the Department of the Army.

The court-martial record is voluminous and it would be impossible to reproduce it in the printed record without inconvenience and additional expense to the government. It therefore appears that this exhibit should be sent to the Court of Appeals for the Fifth Circuit in lieu of copying it into the printed record.

It is ordered that Petitioner's Exhibit No. 1 be and it hereby is designated as a physical exhibit and that it be forwarded with the transcript of record in this appeal to the United States Court of Appeals, under the provisions of Rule 75 (i) in lieu of printing said exhibit and incorporating it as part of the printed record.

It is further ordered that Petitioner's Exhibit 1 be returned to the Clerk of the United States District Court with the mandate from the Court of Appeals and that Petitioner's Exhibit No. 1, by the said clerk, delivered to any member of the Judge Advocate Section, Headquarters Third Army, upon execution of a receipt for the said exhibit.

This 17th day of December 1948.

E. MARVIN UNDERWOOD,
United States District Judge.

In United States District Court

Order for transmittal of exhibit to Court of Appeals

Filed January 4, 1949

It is ordered that the Manual of Interior Guard Duty be transmitted as an exhibit with the appeal, to be returned to this court after disposition of this case by the Court of Appeals for the Fifth Circuit.

Signed this 4th day of January, 1949.

ROBERT L. RUSSELL,

United States District Judge.

We consent:

J. ELLIS MUNDY, U. S. Atty.,

HARVEY H. TYSINGER, Ass't U. S. Atty.,

Attorneys for Appellant.

WALTER G. COOPER for ANDREWS & NALL,

Attorneys for Appellee.

134 Clerk's certificate to foregoing transcript omitted in printing.

135 In United States Court of Appeals for the Fifth Circuit

No. 12641

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY,
ATLANTA, GEORGIA

versus

EUGENE PRESTON BROWN

(And Reverse Title)

Argument and submission

April 13th, 1949

On this day this cause was called, and, after argument by Walter G. Cooper, Esq., for appellee and cross-appellant, and H. M. Peyton, Esq., Lt. Colonel, J. A. G. D., and Eugene M. Caffey, Esq., Colonel, J. A. G. D., for appellant and cross-appellee, was submitted to the Court.

In the United States Court of Appeals for the Fifth Circuit

No. 12641

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY,
ATLANTA, GEORGIA, APPELLANT AND CROSS-APPELLEE

versus

EUGENE PRESTON BROWN, APPELLEE AND CROSS-APPELLANT
(And Reverse Title)

Appeal and Cross-Appeal from the District Court of the United
States for the Northern District of Georgia

Before HOLMES, McCORD, and WALLER, Circuit Judges

Opinion

Filed June 16, 1949

McCORD, *Circuit Judge*: Eugene Preston Brown, while serving as a soldier in the occupation forces of the United States Army, was tried and convicted by a general court-martial at Mannheim, Germany, on January 14, 1947, for a violation of Article of War 92, Title 10 U. S. C. A. 1564. He was thereupon sentenced to be confined at hard labor for life, to be dishonorably discharged from the service, and to forfeit all pay and allowances due or to become due. Upon recommendation of the Army reviewing authorities, his term of confinement was thereafter reduced to twenty years, and he was imprisoned in the United States Penitentiary at Atlanta, Georgia, on September 24, 1947.

On July 9, 1948, Brown petitioned the United States District Court for the Northern District of Georgia for a writ of habeas corpus. After a hearing thereon the writ was sustained, and the petitioner released on bond. From such ruling of the court sustaining the writ and releasing petitioner the United States has appealed. Petitioner has also filed a cross-appeal, alleging numerous additional grounds for sustaining the writ.

The controlling questions presented are: (1) whether the court-martial, as organized, had jurisdiction over the offense, and (2) whether, assuming jurisdiction appears, there was nevertheless such a denial of due process to petitioner as would require us to invalidate his conviction and sentence.

The district court found that the court-martial which tried petitioner was illegally constituted and without jurisdiction, for

the reason that it was organized in plain disregard of the requirements of the 8th Article of War, Title 10 U. S. C. A. 1479, the pertinent provision of which reads as follows:

"The authority appointing a general court-martial shall detail as one of the members thereof a law member *who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member.* The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe."

The record conclusively reveals that the law member appointed to serve on the court-martial was not an officer of the Judge Advocate General's Department. It further appears from the order convening the court-martial that although a Captain of the Judge Advocate General's Department and one other Judge Advocate officer were then available for appointment as law member, the appointing authority nevertheless detailed both these officers to serve as assistant trial judge advocates, and named a Colonel of the Field Artillery to serve as law member instead. No authority, explanation, or reason whatever is offered in justification or excuse of this action.

It is well settled that a court-martial is a military court of limited statutory jurisdiction whose judgments are subject
137 to collateral attack on habeas corpus. *Runkle v. U. S.*, 122 U. S. 543; *McClaghry v. Deming*, 186 U. S. 49; *Givens v. Zerbst*, 255 U. S. 11; *Collins v. McDonald*, 258 U. S. 416. There is no presumption in favor of the validity of a judgment or sentence of a court-martial, and the burden of proving that it was legally organized, that it had jurisdiction, and that all statutory requirements governing its proceedings were complied with, rests upon the party seeking to uphold its judgments. *McClaghry v. Deming*, 186 U. S. 49, 62, 63; *Runkle v. U. S.*, 122 U. S. 543, 555; *Schita v. King*, 133 F. 2d 283. Moreover, while under the decisions of our Court of Last Resort we are not permitted to pass upon or weigh the evidence in order to question the innocence or guilt of persons convicted by courts-martial, the inherent prerogative of a federal court to inquire into the jurisdiction of a court-martial, on application for habeas corpus, has been specifically upheld in the recent pronouncement of *Humphrey v. Smith*,—U. S.—, (in M. S.), wherein the following language appears:

"It is contended that the court-martial was without jurisdiction to try respondent. If so the court-martial exceeded its lawful authority and can be invalidated despite the limited powers of a

court in habeas corpus proceedings. * * * See also, *United States v. Cooke*, 336 U. S. 210; *In re Yamashita*, 327 U. S. 1, 8-9; *Collins v. McDonald*, 258 U. S. 416, 418.

We are of opinion the 8th Article of War requires, in order to insure the protection of fundamental and constitutional safeguards to members of our armed forces, certainly in times of peace, that the presence of a duly qualified law member from the Judge Advocate General's Department be made a jurisdictional prerequisite to the validity of such court-martial proceeding, except in the single instance where such officer is actually, and in fact, "not available." It is without dispute that such law member is charged with the solemn duty and responsibility of a final ruling upon every disputed issue at the trial of restraining the prosecution within proper legal bounds, and of insuring the accused due process of law by carefully preserving his constitutional rights. And where, as here, it conclusively appears that although two of the required law members were actually "available" at the time of their court-martial appointment for the position of law member, and the appointing authority has arbitrarily, and without apparent justification or excuse, appointed both of them to serve as assistant prosecutors of the accused, it leaves the entire proceeding in some sort analogous to a jury trial without a judge present. Cf. *Martin v. Mott*, 12 Wheat. 19; *Mullan v. U. S.*, 140 U. S. 240; *Swain v. U. S.*, 165 U. S. 553.

We readily concede that where the required law member does not clearly appear to have been available at the time a court-martial is organized, an appointing authority may, in his discretion, appoint as law member thereof another officer "specially qualified to perform the duties of law member" who need not be a member of the Judge Advocate General's Department. Such is not the case here. In this case no evidence whatever has been offered to disprove the undisputed fact that a law member from the Judge Advocate General's Department was actually "available" at the time the court-martial was organized, nor does it appear that any discretion was exercised by the convening authority.¹ It is well settled that a party claiming the benefit of a statutory exception must bring himself squarely within its terms. *Ver Mehren v. Sirmeyer*, 36 F. 2d 876, 880; *Vondermuhll v. Helvering*, 75 F. 2d 656; *Canadian Pacific Rwy. Co. v. U. S.*, 73 F. 2d 831, 834; *Givens v. Zerbst*, 255 U. S. 11.

The arbitrary action of organizing this court-martial in complete disregard of the plain requirements of the 8th Article of

¹ Although it appears that one of the required law members was not present at the time of trial, and took no part in the proceedings, no explanation is given for the failure to designate him as law member at the time the court-martial was organized, nor is the failure to appoint as law member the other judge advocate officer who served on the court accounted for.

War is manifestly reviewable, both as an abuse of discretion, and as a fatal organizational defect which effectually divests the court-martial of jurisdiction. Cf. *Henry v. Hodges*, 171 F.2d 401.² To hold otherwise would violate both the spirit and mandate of the Congressional enactment. Manifestly, this is true where the accused, as here, is being tried in time of peace for the offense of murder.

Passing from the jurisdictional issue involved, there remains an additional and independent ground on which this writ should be sustained.¹ The record of this court-martial conviction is replete with highly prejudicial errors and irregularities which have manifestly operated to deprive this petitioner of due process of law. We need cite only a few patent instances.

(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.

(2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.³

139 (3) The record reveals that the law member appointed was grossly incompetent.

(4) There was no pre-trial investigation whatever upon the charge of murder.⁴

(5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.

(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.⁵

While each of the above errors and irregularities may not constitute a jurisdictional defect in itself, still when we consider the

¹ The present law, as revealed by the new Manual for Courts-Martial (1949), Section 4 (e), p. 3, makes it clear that a failure to comply with Article of War 8 in organizing a court-martial is a jurisdictional defect. This section reads, "Failure to appoint a law member of a general court-martial who is qualified as prescribed in Article 8 renders any proceeding of such a court void."

² Murder in the first degree, by common law definition, is the willful, malicious, premeditated, and deliberate killing of a human being. Murder in the second degree is the willful and malicious killing of a human being without premeditation and without deliberation. Malice in law is the intentional doing of an unlawful act without justification or excuse. Here, the undisputed evidence reveals that the altercation or dispute resulting in the death was a sudden affray or encounter which lasted only about two minutes.

³ Charges were originally preferred against the accused for manslaughter, and an investigation was conducted based on this charge. Afterwards, upon order of the Commanding Officer over 100 miles distant, the charge of manslaughter was abandoned without explanation, and a new charge or specification of murder instituted. No additional pre-trial investigation was made. Cf. *Humphrey v. Smith*, — U. S. — (in M. S.). Although in the latter case the Supreme Court held that the pre-trial investigation under Article of War 70 is not a jurisdictional requirement, the entire absence of any investigation whatever upon a charge of murder is still a circumstance to be considered in determining whether there has been a denial of due process.

⁴ The Army reviewing authorities held that since the accused had pleaded self-defense, he could not claim that as a sentry, he was under no duty to retreat. This was highly prejudicial. See *In re Neagle*, 135 U. S. 1; *U. S. v. Lipsitt*, 158 Fed. 65; *Brown v. U. S.*, 256 U. S. 335; *Beard v. U. S.*, 158 U. S. 550, 564; *Rowe v. U. S.*, 164 U. S. 546.

cumulative effect of the highly prejudicial errors present, we are led unerringly to the conclusion that this petitioner has not been accorded a fair trial, even under military law. *Hicks v. Hiatt*, 64 Fed. Supp. 238. We have merely adverted to certain phases of the evidence, not for the purpose of reviewing its sufficiency to support the conviction, but only to show that but for the errors complained of, petitioner might have had some measure of due process. Although we realize that it is no longer our province to review the evidence in a court-martial proceeding,* we believe it still essential that an accused before a military tribunal be accorded at least some semblance of a fair trial.

140 Otherwise, the constitutional guaranty of due process of law under the Fifth Amendment, as applied to habeas corpus applications from court-martial convictions, no longer obtains in the federal courts. In the absence of a plain pronouncement to that effect from our Court of Last Resort, it is not our province to so declare the law. Cf. *Wade v. Hunter*, — U. S. — (in M. S.).

We conclude that the conviction and sentence of this petitioner are invalid, both because his court-martial was without jurisdiction, and because he has not been afforded due process of law. *McClaghry v. Deming*, 186 U. S. 49, 62, 63; *Wade v. Mayo*, 334 U. S. 672; *Bridges v. Wixon*, 326 U. S. 135, 156; *Vajntner v. Commissioner*, 273 U. S. 107; *Schita v. King*, 133 F. 2d 283; Cf. *Humphrey v. Smith*, — U. S. — (in M. S.); *Henry v. Hodges*, 171 F. 2d 401; *In re Yamashita*, 327 U. S. 1; *Swaim v. U. S.* 165 U. S. 553. In view of this holding, we consider it unnecessary to pass upon the other assignments of error urged by petitioner in his cross-appeal.

It follows that the action of the district court in sustaining the writ and discharging petitioner should be, and the same is hereby Affirmed.

WALLER, Circuit Judge: I dissent.

* *In re Yamashita*, 327 U. S. 1, 8-9; *Humphrey v. Smith*, — U. S. — (in M. S.).

In United States Court of Appeals

No. 12641

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY,
ATLANTA, GEORGIA

versus

EUGENE PRESTON BROWN
(And Reverse Title)

Judgment

June 16, 1949

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"WALLER, Circuit Judge, dissents."

141 Clerk's certificate to foregoing transcript omitted in printing.

142 Supreme Court of the United States

No. 359. October Term, 1949

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY,
ATLANTA, GEORGIA, PETITIONER

vs.

EUGENE PRESTON BROWN

Order extending time to file petition for writ of certiorari

Upon consideration of the application of counsel for petitioner, It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 30th, 1949.

(Signed) HUGO L. BLACK,
Associate Justice of the Supreme
Court of the United States.

Dated this 13th day of September 1949.

143

Supreme Court of the United States

No. 359.- October Term, 1949

Order allowing certiorari

Filed December 5, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in reponse to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19....

No.

WILLIAM H. HIATT, Warden, United States
Penitentiary, Atlanta, Georgia,
PETITIONER,

vs.

EUGENE PRESTON BROWN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I N D E X

	Original	Print
Petitioner's Exhibit No. 1—Court-Martial Record	"A"	1
Clerk's certificate	"A"	1
Certificate of Judge Advocate General	"B"	3
Review by Board of Review	1	5
Holdings by Board of Review	3	6
Pleas, findings and sentence	5	7
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Court-Martial data sheet	7	11
Review of the Staff Judge Advocate	9	15
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Organization of Court	41	54
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	Original	Print
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"A"

In United States Court of Appeals
for the Fifth Circuit

Clerk's Certificate

I, OAKLEY F. DODD, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the attached exhibit, complete court-martial record marked "Petitioner's Exhibit No. 1" is the original exhibit forwarded to this Court with the transcript of the record of the District Court of the United States for the Northern District of Georgia, on appeal in cause No. 12641 of the docket of said Court of Appeals, entitled:

WILLIAM H. HIATT, Warden, United States
Penitentiary, Atlanta, Georgia,
APPELLANT AND CROSS-APPELLEE,

versus

EUGENE PRESTON BROWN,
APPELLEE AND CROSS-APPELLANT,

(AND REVERSE TITLE)

and is transmitted herewith to the Honorable Supreme Court of the United States.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 8th day of August, A. D. 1949.

OAKLEY F. DODD, *Clerk*

By J. A. FEEHAN, J.
*Deputy Clerk, U. S. Court
of Appeals, Fifth Circuit*

(SEAL)

(P.3)

United States

of America

12641

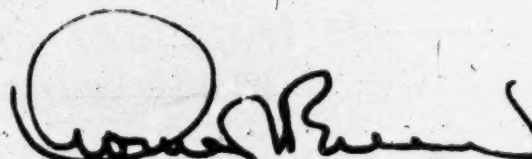
ADMITTED SEP 28 1948

PETITIONER'S EXHIBIT No. 1
CASE No. H. C. 2320

DEPARTMENT OF THE ARMY

WASHINGTON, July 14, 1948

I HEREBY CERTIFY that the attached is a photostatic copy of the record of trial of Technician 5th Grade Eugene P. Brown, 34001224, by a general court-martial which convened at Mannheim, Germany, 9 and 14 January 1947, together with accompanying papers, official copy of General Court-Martial Orders No. 190, Headquarters Continental Base Section, European Command, dated 16 May 1947, holding of the Board of Review dated 24 April 1947, and first indorsement of The Judge Advocate General dated 9 May 1947, on file in the office of The Judge Advocate General.



THOMAS H. GREEN
Major General
The Judge Advocate General

I HEREBY CERTIFY that Major General Thomas H. Green, who
signed the foregoing certificate, is the Judge Advocate General of the Army, and
that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, KENNETH C. ROYALL, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 14th day of July, 1948.

Kenneth C. Royall
Secretary of the Army.

By James C. Cook
Deputy Administrative Assistant.

1

WAR DEPARTMENT

In the Office of The Judge Advocate General
Washington 25, D. C.

JAGK—CM 320696

24 Apr 1947

UNITED STATES

v.

Technician 5th Grade
EUGENE P. BROWN
(34001224), 994th Ordnance HAM Company,
178th Ordnance Battalion.

CONTINENTAL BASE SECTION

Trial by G. C. M. convened at Mannheim, Germany, 9 and 14 January 1947. Dishonorable discharge and confinement for life. Penitentiary.

*Review by the Board of Review Silvers, McAfee and
Ackroyd, Judge Advocates*

1. The Board of Review has examined the record of trial in the case of the soldier named above.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Eugene P. Brown, 994th Ordnance HAM Company, did, at Feuerbach, Germany, on or about December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Josef Kowalsezyk, a human being, by shooting him with a pistol.

Accused pleaded not guilty to and was found guilty of the specification and the charge. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50¹/₂.

3. The Board of Review adopts the statement of law and evidence contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

CHESTER A. SILVER, *Judge Advocate*

CARLOS E. McAFEE, *Judge Advocate*

GILBERT G. ACKROYD, *Judge Advocate*

3 W. D., J. A. G. O. Form No. 34

(Revised July 1, 1940)

WAR DEPARTMENT

In the Office of the Judge Advocate General
Washington, D. C.

Board of Review
CM 320696

UNITED STATES

v.

Technician 5th Grade
EUGENE P. BROWN
(34001224), 994th Ordnance HAM Company

24 Apr 1947

CONTINENTAL BASE SECTION
U. S. FORCES, EUROPEAN THEATER
Trial by G. C. M., convened at
Mannheim, Germany, 9 and 14
January 1947. Dishonorable
discharge and confinement for
life. Penitentiary.

*Holding by the Board of Review
Silvers, McAfee and Ackroyd, Judge Advocates*

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

CHESTER D. SILVERS, *Judge Advocate*

CARLOS E. McAFEE, *Judge Advocate*

GILBERT G. ACKROYD, *Judge Advocate*

1st Indorsement

War Department, J. A. G. O. May 9 1947. To the Commanding General, Continental Base Section, U. S. Forces,

European Theater, APO 807, c/o Postmaster, New York, N. Y.

1. In the case of Technician 5th Grade Eugene P. Brown (34001224), 994th Ordnance HAM Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. In view of all the circumstances of the case, it is recommended that the period of confinement be reduced to twenty years.

3. A radiogram is being sent advising you of the foregoing holding and my approval thereof. Please return the said holding and this indorsement and, if you have not already done so, forward therewith six copies of the published order in this case.

THOMAS H. GREEN

Thomas H. Green

Major General

The Judge Advocate General

(CM 320696).

5

RESTRICTED

HEADQUARTERS

CONTINENTAL BASE SECTION

EUROPEAN COMMAND

APO 807

16 May 1947

GENERAL COURT-MARTIAL)

ORDERS NUMBER 190)

Before a general court-martial which convened at Mannheim, Germany, pursuant to paragraph 2, Special Orders Number 273, this headquarters, 7 December 1946, was arraigned and tried:

Technician Fifth Grade EUGENE P. BROWN, RA 34 001 224, 994th Ordnance Heavy Automotive Maintenance Company, 178th Ordnance Battalion.

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Eugene P. Brown, 994th Ordnance HAM Company, did, at Feuerbach, Germany, on or about 25 December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Josef Kowalsczyk, a human being, by shooting him with a pistol.

Pleas

To the Specification:
To the Charge:

NOT GUILTY
NOT GUILTY

Findings

Of the Specification and Charge:

GUILTY

Sentence

—To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. (No previous convictions considered.)

The sentence was adjudged on 14 January 1947.

The sentence is approved, but upon recommendation of The Judge Advocate General, the period of confinement is reduced to twenty (20) years. Article of War 50½ having been complied with, the sentence, as thus modified, will be duly executed. The United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, is designated as the place of confinement.

BY COMMAND OF BRIGADIER GENERAL BRESNAHAN:

W K GHORMLEY
Colonel, GSC
Chief of Staff

OFFICIAL:

THOS E P BARBOUR
Thos E P Barbour
Colonel, AGD
Adjutant General

Classification

Cancelled ~~Changed to~~
By Authority of TJAG
By CHARLES J. BERKOWITZ
Major, JAGD
Date Jul 12 1948

DISTRIBUTION:

1—CG CBS
3—TAG, Attn Enl Br,
Wash 25, D. C.
10—JAG, Wash 25, D. C.
7—60 Ordnance Group
1—Tec 5 Eugene P Brown
6—CG EUCOM
2—Chief of Finance, Wash
25, D. C.
20—JA CBS

1—G-1 CBS
1—AG (Personnel) CBS
1—AG (Records) CBS
2—PM CBS
5—EUCOM MILITARY PRISON,
Mannheim, Germany
5—US Penitentiary, Lewisburg,
Pennsylvania

6 *A Chronology of the Case of:*

Tec 5 Eugene P. Brown, 3 4001224 994 Ordnance HAM Co.

	Date	No. of Days	Explanation
1. Offense committed	25 Dec		
2. Accused confined:			
By Civil authorities	.....	.....
By military authority	28 Dec	.....
By military authority ordering trial	.....	.....
Reconfined from escape	.....	.....
3. Charges preferred:	30 Dec	2	
(Date of Jurat)			
4. Charges investigated:	27 Dec	.....
(Date of Report)			
5. Charges forwarded by C. O.	28 Dec	.....
6. Charges received by, J. A.	30 Dec	2	
7. Charges returned:	.....	.....
8. Charges received back:	.....	.....
9. Charges-action Staff J. A.	30 Dec	2	
10. Charges referred for trial	30 Dec	2	
11. Trial Had:	9 & 14 Jan	17	
Total days to trial	.....	.....	Excess delay due to other cases on the books of and being reported by the reporter & includes time for authentication of the record.
Less time in hospital	.....	.....
Less time at request of defense	.....	.....
Net Total	.....	.....
12. Record of trial received:	13 Feb	47	Excess time due to inadequate personnel for processing the volume of work.
13. Review by Staff J. A.	1 Mar	63	
14. Action by reviewing authority	3 Mar	65	
Total to Action by Reviewing Authority	.....	.....
15. Mimeo. orders received:	.....	.....
16. Recd. of trial mailed to J. A. G. O.	6 Mar	68	
Total	.....	68	

Remarks

Place accused confined.....
White or colored.....

LESTER J. ABELE,
Colonel J. A. G. D.,
Staff Judge Advocate.

All delays must be fully explained.

In computing number of days between two dates, disregard the first day and count the last day. All months will not be assumed to consist of 30 days.

320696

✓ GENERAL COURT-MARTIAL DATA SHEET

Name Surname P. RA 34001-44 T-5 32A G.S. No. 172 Ord. Pat.
 (Last name) (First name) (Middle initial) (Army serial No.) (Grade) (Organization, Regiment, or Unit or Station)
 J.A.G.O.C.M. No. 320696

	Trial I.A.		Summary I.A.		J.A.G.O. <u>320696</u>
	Yes	No	Yes	No	
1. Was court ordered by proper authority?	✓		✓		✓
2. Are all copies showing membership of court properly entered in record?	✓		✓		✓
3. Were there less than five members detailed or present at any meeting?		✓	✓		✓
4. Was the law number of the court designated by convening order?	✓		✓		✓
5. If the presence of the law number was specifically required by the convening authority, was he present at each meeting?	✓		✓		✓
6. Did the court have jurisdiction of person and offense?	✓		✓		✓
7. Does the record show place, date, and hour court convened?	✓		✓		✓
8. (a) Are all members of the court, trial judge advocate, assistant trial judge advocate, defense counsel, and assistant defense counsel accounted for as present or absent?	✓		✓		✓
(b) If absent, is reason for absence given?	✓		✓		✓
9. Was counsel called when he desired so counsel?	✓		✓		✓
10. Was reporter present?	✓		✓		✓
11. Is reporter's voucher attached to record or its absence explained?	✓		✓		✓
12. Was interpreter present?	✓		✓		✓
13. Is copy of record for each accused accounted for?	✓		✓		✓
14. Was counsel extended right of challenge as to each member of the court, and was he instructed as to his right to exercise one peremptory challenge against any member except the law reporter?	✓		✓		✓
15. Was action of court upon challenges regular and properly taken?	✓		✓		✓
16. Was the court sworn?	✓		✓		✓
17. Was any officer sitting as a member of the court the accused, a witness for the prosecution, or, upon a rehearing, one who sat as a member on the former trial?		✓	✓		✓
18. Was the prosecutor for the prosecution sworn?	✓		✓		✓
19. Was the accused properly arraigned?	✓		✓		✓
20. Are there copies filed in the record—					
(a) Charges and specifications?	✓		✓		✓
(b) Names, grade, and organization of the person signing charges?	✓		✓		✓
(c) Affidavit to the charges and specifications?	✓		✓		✓
(d) Names of the persons who administered the oath verifying the charges, and his official capacity?	✓		✓		✓
(e) The order of reference for trial?	✓		✓		✓
21. If plea of guilty was explained was accused's response, if any, recorded?	✓		✓		✓
22. Does each specification state an offense under the Articles of War?	✓		✓		✓
23. If the accused was advised of his right to plead the statute of limitations, was his response, if any, recorded?	✓		✓		✓
24. Are pleas of not guilty properly entered?	✓		✓		✓
25. Were the witnesses sworn?	✓		✓		✓
26. Was the finding properly entered?	✓		✓		✓

(over)

320696

	TRIAL J. A.		STAFF J. A.		J. A. G. O.	
	Yes	No	Yes	No	Yes	No
27. Was the vote upon each finding in closed session and by secret written ballot?	✓		✓		✓	
28. Is the evidence, if any, of previous convictions admissible? (Par. 79c, M. C. M.).			✓		✓	
29. Was the vote upon the sentence in closed session and by secret written ballot?	✓		✓		✓	
30. Did at least two-thirds of members present at the time the vote on each finding was taken concur therein?	✓		✓		✓	
31. In each case of finding of guilty where death sentence was mandatory, did all members present concur in each finding?			✓		✓	
32. Did members present concur in sentence, as follows: To death, all members; to life imprisonment or confinement for over two years, at least three-fourths of members; to any other punishment, at least two-thirds?	✓		✓		✓	
33. Does the evidence sustain the findings of the court?	✓		✓		✓	
34. Are the findings legal?	✓		✓		✓	
35. Is the sentence legal?	✓		✓		✓	
36. Does any ruling of the court on the admission of evidence or other matters injuriously affect the substantial rights of accused?			✓		✓	
37. Did all members who participated in proceedings in revision vote on original findings and sentence?			✓		✓	
38. At proceedings in revision are the trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, the accused, and the individual counsel, if any, accounted for as present or absent?			✓		✓	
39. Is the record properly authenticated?	✓		✓		✓	
40. Does it sufficiently appear that the defense counsel accepts the record as correct?	✓		✓		✓	
41. Is action of reviewing authority properly entered in record and signed?			✓		✓	
42. In case of adjournment or continuance, are each day's proceedings properly signed by trial judge advocate?			✓		✓	
43. After each adjournment during trial, is presence or absence of members of court, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, accused, his individual counsel, and the reporter properly accounted for?			✓		✓	
44. Does action of reviewing authority:						
(a) Expressly approve the sentence and order its execution or suspension?			✓		✓	
(b) Designate the proper place of confinement?			✓		✓	
(c) Is the action otherwise legal and properly taken?			✓		✓	
45. Is clemency recommended by the court?			✓		✓	

NOTE.—Questions 15, 19, 31, 32, 33, 34, 35, 41, and 44 not to be answered by the trial judge advocate. Question 44 not to be answered by the staff judge advocate.

Richard H. Rame
Capt Mac
Trial Judge Advocate

12 Feb 47

Richard H. Rame
Staff Judge Advocate
5 March 47

Charles E. McAfee
Col. J. A. G. O.
Chief Reviewing Record

LS
(Action)

April 23, 1947

Bd of Review #2

Chief Member

(Action)

(Date)

9 *Review of the Staff Judge Advocate*

HEADQUARTERS
CONTINENTAL BASE SECTION
U. S. FORCES, EUROPEAN THEATER
Office of the Staff Judge Advocate

Staff Judge Advocate, Continental Base Section, APO 807,
U. S. Army, 1 March 47.

To: COMMANDING GENERAL, Continental Base Section, APO
807, U. S. Army.

1. The RECORD OF TRIAL BY GENERAL COURT-MARTIAL of the following named accused having been referred to me under the provisions of the 46th Article of War before action thereon by the reviewing authority, I submit herewith my review with opinion and recommendation and reasons therefor, as required by paragraph 87b of the Manual for Courts-Martial.

2. SYNOPSIS OF THE RECORD AND OF THE OPINION AND RECOMMENDATION:

BROWN, Eugene P. 34 001 224, Technician Fifth Grade, 994th Ordnance HAM Company, Esslingen, Germany, tried at Mannheim, Germany.

Age: 39 years.

Date of Enlistment: 17 November 1945.

Previous Service: 4 8/12 years.

Previous Convictions: None.

Character of Service: Satisfactory.

Date of Offense: 25 December 1946.

Confined: 28 December 1946.

Service of Charges: 3 January 1947.

Arraigned: 9 January 1947.

Opinion of the Staff: Reversible errors under the 37th Article of War: None.

Judge Advocate: Findings of the court legally sustained: Yes.

<u>Violation of AW No:</u>	<u>Specification:</u>	<u>Plea:</u>	<u>Findings:</u>	<u>Legally Sustained:</u>
92	Murder	NG	G	Yes

Maximum Punishment (based on legally sustained findings): Death.

Sentenced adjudged by the court: DD, TF, and CHL for life.

Recommendation of the Staff, Judge Advocate: Approval of sentence.

3. ARRAIGNMENT:

Accused was properly arraigned and pleaded not guilty to the Charge and specifications (R 4, 5, 6).

4. EVIDENCE.

a. For the Prosecution:

On the evening of 25 December 1946, Franz Olschewski and Josef Kowalsczyk, Polish guards, entered the guard shack at the motor pool of the 994th Ordnance HAM Company in Feuerbach, Germany (R 7, 13, 14, 28).

10 Accused who was on guard, was inside the shack accompanied by a German girl (R 7, 12, 17, 18, 19, 28). Accused produced a pistol, threatened Olschewski and Kowalsczyk and told them to get out (R 7, 13). Olschewski and Kowalsczyk left the building and accused followed them to the door (R 8, 13, 14). Olschewski said to accused, "Boy, it is OK what you do", whereupon the accused fired his pistol (R 8, 14). Kowalsczyk walked a few steps, clutched his stomach and fell (R 8). Two American soldiers took the wounded Pole from where he was lying outside the guard shack to the hospital (R 19, 20, 22, 23). Kowalsczyk died as a result of a gunshot wound in the right chest and abdomen (R 25).

b. For the Defense:

The Poles said something to accused after accused had told them to get out of the guard shack (R 16). When accused relieved the soldier that preceded him at the guard post at the motor pool of the HAM Company, there was no bottle by the door of the guard shack (R. 44). When accused was relieved from his guard post after the shooting, a bottle about 12" long and 3" in diameter was inside the guard shack standing by the door (R 44).

Accused, after having been advised by the law member in open court as to his rights as a witness, elected to take the stand under oath and made a sworn statement substantially as follows: Accused had received instructions to keep Polish soldiers away from his guard post. When the two Poles came to his guard post on 25 December, he intended to let them come in and get warm and then make them leave. The Poles started "messaging around" with the girl who was with the accused in the shack. When asked to leave by the accused the two Poles were reluctant to go. One of them "struck his fist" at accused "on the lip". They walked outside and stopped, whereupon the accused picked up a pistol from behind a coal box and went to the door of the shack. One of the Poles swung a bottle at accused three times, at which accused shot the Pole. The shooting was in self-defense. The Pole dropped the bottle which he had in his hand and walked several paces before falling. Accused picked up the bottle and placed it inside the guard shack by the door (R. 26, 27, 30, 31, 46).

5. COMMENT AND OPINION:

The court was legally constituted and had jurisdiction over the offense and the accused. The record is legally sufficient to support the findings and the sentence.

a. The evidence is clear and uncontroverted, and is supported by accused's statement that the deceased was shot by the accused. It was stipulated that the deceased died as a result of the gunshot wound in the right chest and abdomen. The defense offered evidence in an attempt to prove that the accused shot the deceased in self-defense. Taken as a whole the testimony of the accused, insofar as it is suggestive of a theory that he acted in self-defense, is not convincing. Even were the testimony of the accused in this particular accepted as true, he did not show facts which would constitute a legal excuse for the killing. The accused, in his testimony, indicates that there was resentment on the part of the accused to the actions of the two Poles in "messing around" with the German girl, who was present in the guard shack with the accused. Accused ordered the two Poles from the shack, produced a pistol, proceeded to the door of the shack after the Poles had gone outside, and fired through the open door, killing the deceased. Even had the Pole swung at accused with a bottle, as is stated by the accused, such act was not sufficient to justify the shooting. To excuse a killing on the grounds of self-defense upon a sudden affray, the killing must have been believed, on reasonable grounds, by the person doing the killing, to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed, on reasonable grounds, to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can (Par. 148a, MCM 1928, page 163). "When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die". (Comm. v. Drum, 58 Pa. St. 922) (XXI Board of Review, JA G, page 271, CM 235044 *Winters*). Tested by these rules, it is not believed that a reasonable man, placed in the position of accused under the circumstances portrayed by him, had good reason to believe that his life was sufficiently in danger to justify him in resorting to the taking of life to prevent losing his own. The rule is further qualified by the important principle that before a person may take life in defense of his own, he must have retreated as far as he safely can. No evidence was offered that accused in this

case could not have withdrawn within the shack, closed the door, and thereby avoided further conflict with the two Poles.

6. ERRORS AND IRREGULARITIES:

The following errors and irregularities, none of which injuriously affect the substantial rights of the accused, are noted:

a. On page 9 of the record it appears that the law member instructed the prosecution to refrain from asking leading questions, defining leading questions as being those which were answerable by "yes" or "no". This instruction was incorrect. The fact that a question is answerable by "yes" or "no" does not necessarily indicate that the question is leading.

b. On page 25 of the record it appears that a stipulation, very essential to the case of the prosecution, was offered by the prosecution and was agreed to by the "defense". It does not appear that the accused was personally asked if he agreed to the stipulation. It is believed to be the best policy to ask both the defense counsel *and the accused* whether they agree to an offered stipulation.

c. On page 40 of the record it appears that the witness, Stone, who had been recalled "in rebuttal", was being questioned by the court and the prosecution made a statement to the court, "If it please the court, these are not proper rebuttal questions". The court has every right to call or recall any witness it desires and to question them. The prosecution should not insist upon the procedural technicality that a witness who is on the stand as a "rebuttal witness" be excused and then recalled by the court for further questioning.

12 d. On page 42 of the record it appears that, following the direct examination of the witness, Stone, who had been recalled to the stand as a witness for the court, the defense made the statement, "I want to question the witness—I have no question about the relieving of the guard but I want to ask one other question". The law member replied, "It is the opinion of the law member that you can recall him as a witness". It appears that the witness was excused and was then later recalled and questioned by the defense. It is believed that it would have been procedurally more simple to have allowed the defense to adopt the witness as his own witness and to question him while he was still on the stand following the direct examination of the witness.

7. PERSONAL HISTORY:

a. Civilian Background:

The accused was born at Hendersonville, North Carolina, 27 August 1907, the last of nine children. His parents are natives of Henderson County, North Carolina. His father, who was a farmer, is dead. The father completed fifth grade, but nothing is known about the education of the mother. Four brothers, all married, are still living. He has no sisters. The accused completed one year of high school in 1923. He discontinued his education in order to go to work. He is a Baptist. He worked for his father from 1923 to 1929, and for the Shoeman Heat & Roofing Co. from 1930 to 1932 as well as for the Mt. City Stove and Iron Works, no period of time indicated. He worked as a sheet metal worker and earned from \$40.00 to \$48.00 per week. He has never held any position in a supervisory capacity. He left his last position to enter the service. He married in 1929 and was divorced in 1943. One child was born of this union, for whose support he contributes \$42.00 per month. He owns twelve acres of land in North Carolina, and has no other property interests. His physical condition, since entering the Army, is good. The accused asserts that he has no record of juvenile delinquency or of difficulties with the civilian authorities.

b. Military Background:

The accused enlisted in the Army 10 December 1940 and has been assigned as a mechanic and as a small armorer. He is a qualified mechanic, rifleman and driver. The highest rating he obtained in the Army is that of Technician Fifth Grade. He has had one Special Court-Martial for missing guard. Since 1 July 1942 he has served in Scotland, Ireland, England, France, Belgium, Germany, Holland and Luxembourg.

8. PUNISHMENT AND CLEMENCY:

Due to the serious nature of the offense of which the accused was found guilty, clemency is not indicated in this case.

9. RECOMMENDATION:

A. It is recommended that:

- 13 (1) The sentence be approved.
- (2) The United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, be designated as the place of confinement.

(3) Pursuant to Article of War 50½ the order directing the execution of the sentence be withheld.

b. A form of action designed to carry this recommendation into effect, should it meet with your approval, is attached.

LESTER J. ABELE
Lester J. Abele
Colonel JAGD
Staff Judge Advocate

(WRITE NOTHING ABOVE THIS LINE)

Charge Sheet

Esslingen Germany, 27 December, 1946
(Place) (Date)

Name, etc., of accused Brown Eugene P., RA 34001224,
(Give last name, first name, and middle initial)

Technician Fifth Grade, 994th Ordnance HAM Company,
in that order followed by serial number, grade, company, regiment, arm or
178th Ordnance Battalion
service, or by other appropriate description of accused. Alias names, etc.,

to follow in same manner)

Age 39 Pay, \$112.50 per month. Allotments to depend-
(Base pay plus pay for length of service)
ents, \$27.00 per month.

Government Insurance deduction, \$ None per month.

10 Dec 1940 to Dec 3, 1941. ERC 3
Data as to service: 16 January 1942 to 6 September 1945,
(As to each terminated enlistment, give including

Dec 41 to 16 Jan 42. AUS 16 Jan 42 to 6 Sept 45. 17-
2060th Trk Co Enl 17 November 1945 to serve three (3)
dates of service and organization in which serving at termination. As to
Nov 45 for 3 yrs RGK
years.

current enlistment, give the initial date and the term thereof. Give similar
data as to service not under an enlistment)

Data as to witnesses, etc.:

(Give names, addresses, and note if for

accused. List documentary evidence and note where each item thereof may
be found)

Against the Accused:

Private Richard E Stone, RA 45056411, 994th Ordnance
HAM Company

Private Carl A Oaks, RA 35998364, 994th Ordnance HAM
Company

Frank Olschewski, Polish Civilian, Esslingen Germany
Elizabeth Rehm, German Civilian, Rudiger Strasse,
Stuttgart Germany

For Accused:

None

Data as to restraint of accused: Confined Provost Marshals

(Give date, place, and

Office Stuttgart Germany 3rd Army Stockade 28 Dec 46
initial date of any restraint of accused)

W. D., A. G. O. Form No. 115
8 July, 1943

(1)

15 CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade
Eugene P. Brown, 994th Ordnance HAM Company, did, at
Feuerbach, Germany, on or about 25 December 1946, with
malice aforethought, willfully, deliberately, feloniously, un-
lawfully, and with premeditation, kill one Josef Kowalsczyk,
a human being, by shooting him with a pistol.

(Additional sheets, if necessary, for charges and specifications will be at-
tached here. Ordinary 8 by 12½-inch paper will be used for
additional sheets)

(2)

(WRITE NOTHING BELOW THIS LINE)

(WRITE NOTHING ABOVE THIS LINE)

(Signature of accuser) ROBERT E. BYRNERobert E. ByrneCaptain, JAGDHq. Continental Base Section

(Grade, organization, arm, or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 30th day of December, 1946, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he* has personal knowledge of the matters set forth in specifications

(Indicate by specification and charge numbers)

_____; and *has investigated the matters set forth in specifications of the Charge, and that the

(Indicate by specification and charge numbers)

same are true in fact, to the best of his knowledge and belief.

(Signature) GERALD A. SAMS

(Grade and organization)

Gerald A. SamsCaptain, JAGDAsst. Trial Judge Advocate, CBS

(Official character, as summary court, notary public, etc.)

Notes.—At (*) strike out words not applicable.

If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof; and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated.

If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st IND.

Headquarters Continental Base Section, Bad Nauheim,
Germany, 30 December, 1946.

(Place)

(Date)

Referred for trial to Captain RICHARD G. KANE, Trial

(Grade, name, and organization of summary

Judge Advocate

of General

court-mar-

court or trial judge advocate)

(Summary) (Trial judge advocate of special

tial appointed by paragraph 2, Special Orders No. 273,
or general)

Headquarters Continental Base Section, Bad Nauheim,
Germany, 7 Dec., 1946.

By Command of Brigadier General Bresnahan.

(Command or order) (Grade and name of commanding officer)

C. J. KLEINEGGER

Adjutant

C. J. Kleinegger

Major, AGD

Asst. Adj. Gen.

(3)

32

HEADQUARTERS
CONTINENTAL BASE SECTION
U. S. FORCES, EUROPEAN THEATER
Office of the Staff Judge Advocate

30 December 1946

Staff Judge Advocate, Continental Base Section, APO 807
To: Commanding General, Continental Base Section, APO
807, US Army

1. Charges and allied papers attached hereto in the case of T/5 Eugene P. Brown ASN 34 001 224

Orgn: 994th Ord HAM Co., have been examined pursuant to your instructions and in accordance with the provisions of Article of War 70.

2. The accused is charged with violation of the Article of War 92nd for the offense of murder.

3. The available evidence, as disclosed by the file, is sufficient to constitute a prima facie case of guilt against the accused for the offense (s) charged.

4. The charges and specifications are in proper order and all procedural requirements have been complied with. There is no reason to believe that the accused was mentally defective or deranged at the time of the commission of the alleged offense, or is mentally defective or deranged at the present time.

5. I recommend trial by General Court-Martial.

LESTER J. ABELE
Lester J. Abele
Colonel JAGD
Staff Judge Advocate

Classification
Cancelled

By Authority of UAG
CHARLES J. BERKOWITZ
Major, JAGD
Date Jul 12 1948

19

*Pretrial Investigating Officer's Report*Headquarters 178th Ordnance Battalion
APO 172U. S. Army27 December 1946

Subject: INVESTIGATION OF CHARGES.

To: Commanding Officer, 178th Ordnance Battalion, APO
172, US Army

1. I have investigated the inclosed charges dated 27 December 1946 against Technician fifth grade Eugene P. Brown RA 34 001 224, 994th Ordnance HAM Co. APO 172, US Army in accordance with the provisions of Article of War 70 and paragraph 35a, Manual for Courts-Martial. At the outset of the investigation; I informed the accused of the nature of the charges alleged against him; of the names of the accuser and witnesses, so far as known to me; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him.

2. In the presence of the accused, I have examined all available witnesses and documentary evidence and have reduced the material testimony given by each witness, under direct and cross examination, to a statement embodying the substance of the testimony taken on both sides, which said statement is attached hereto as hereinafter indicated:

3. The substance of the expected testimony of the following-named witnesses either in oral or written form was made known to the accused who stated he did not desire to cross-examine such witnesses and therefore the same were not called or examined in the presence of the accused.

Elisabeth Rehm

Richard E. Stone

Pfc Carl A. Oaks

Franz Olschewski

Captain Robert J. Brimi

4. The following documents have been examined, shown to the accused, and are appended:

None

W. D., A. G. O. Form No. 120

January 5, 1943

33

"Prosecution Exhibit No. 1"

EXTRACT COPY OF GUARD REPORT 994TH ORD
HAM Co. 4TH ECH:
for period 25 December to 26 December 1946

LIST OF THE GUARDSERGEANTSCORPORALSBUGLERSORDERLIES

Henderson

First Relief	Second Relief	Third Relief
From 0600 to 0800	From 0800 to 1000	From 1000 to 1200
STONE	BROWN	OAKES

/s/ H. A. Henderson
994 Ord HAM Co.

Certified a True Copy

RICHARD G. KANE
Richard G. Kane
Captain MAC

20 5. The accused, after he had been carefully warned by me as above indicated, ~~*said that he did not desire to make a statement or~~ *made the statement hereto attached. (Ex. A)

*Strike out words not applicable.

6. Explanatory or extenuating circumstances:

None

7. There is no reasonable ground for a belief that the accused is now, or was at the time of the commission of the alleged offense(s), mentally defective, deranged, or abnormal.

8. Trial by General Court Martial is accordingly recommended.

9. There is attached a record of No previous convictions committed during the current enlistment and within one year preceding the commission of the offense for which the accused is now charged. (Par. 79, MCM.)

10. In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, of salvaging all possible military material, and the established policy of the War Department that trial by general court martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

JAMES G. KLEESE
(Signature)

James G. Kleese
(Name, typed)

Major Ord. Dept.
Investigating Officer
(Grade and organization)

21 201-Brown, Eugene P. (Enl) 3rd Ind. AMT/at
HEADQUARTERS 178 ORD BN APO 172 US Army 27
December 1946.

To: The Commanding Officer, 60th Ordnance Group, APO
175, US Army.

In the case of Private Eugene P. Brown, RA 34001224,
994th Ord HAM Company, Trial by General Court Martial
is recommended.

ARTHUR M. TENNEY
Arthur M. Tenney
Lieut Colonel, Ord Dept
Commanding

9 Incls: n/c.

201-Brown, Eugent P. (Enl) 4th Ind. PP/h
HEADQUARTERS 60TH ORDNANCE GROUP, APO 175 U. S. ARMY,
28 December 1946.

To: Commanding General, Continental Base Section, APO
807, U. S. Army.

Attn: S. J. A.

Recommend trial by General Courts Martial.

For the Commanding Officer:

PAUL PHILLIPS
Paul Phillips
Capt., Ord. Dept.
Adjutant

9 Incls: n/c

Tel: Darmstadt 270-376, Ext 52.

22 201-Brown, Eugene P. (Enl) 1st Ind. CTA/
HEADQUARTERS 178TH ORDNANCE BATTALION, APO 172,
US ARMY, 27 December 1946

To: Major James G. Kleese, Hq., 178th Ordnance Bn., APO
172 US Army.

1. You are designated to investigate the inclosed charges
against Technician Fifth Grade Eugene P. Brown, RA
34001224, 994th Ordnance HAM Co. Your investigation will
be conducted in conformity with paragraph 35a, MCM.

2. The investigation will be completed on WD AGO Form
No. 120 (Pretrial Investigating Officer's Report) and re-
turned within 48 hours. Any delay beyond that period will
be explained in your report.

BY ORDER OF LIEUTENANT COLONEL TENNEY:

C. T. ANDREWS
C. T. Andrews
Capt., Ord. Dept.
Adjutant

7 Incls:
n/c

2nd Ind.

JGK/

MAJOR JAMES G. KLEESE 0-437663 HEADQUARTERS 178TH ORD-
NANCE BATTALION, APO 172.

To: COMMANDING OFFICER, 178TH ORDNANCE BATTALION.
APO 172, US Army.

1. The charges subject of the first Indorsement and allied
papers returned herewith.

JAMES G. KLEESE
James G. Kleese
Major Odr. Dept.
Investigating Officer.

9 Incl:

#8 Report of Pretrial Investigation (Trip)

#9 Sworn Statement of T/5 Eugene P. Brown (Trip)

23

994TH ORDNANCE HEAVY AUTOMOTIVE
MAINTENANCE COMPANY

APO 172

US Army

27 December 1946

SUBJECT: General Court-Martial Charges.

To: Commanding Officer, 178th Ordnance Battalion, APO
172, US Army.

1. In compliance with paragraph 23, MCM, there are
forwarded herewith court-martial charges against:

Brown Eugene P 34001224 Tec 5 994th Ordnance
HAM Company

Last Name	First Name & initial	ASN	Grade	Organization
2. Summaries of expected testimony upon which the charges are based are attached.				
3. Character of military service of accused prior to offenses here charged: <u>Satisfactory.</u>				
4. In my opinion he should be eliminated from the service.				
5. I recommend trial by <u>General Court-Martial.</u>				
EARL E. NOEL				
Earl E. Noel				
Capt Ord Dept				
Commanding				
7 Incls:				
#1 Court Martial Charge Sheets (Trip)				
#2 Statement of Elisabeth Rehm (Trip)				
#3 Statement of Pvt Richard E. Stone (Trip)				
#4 Statement of Pfc Carl A. Oaks (Trip)				
#5 Statement of Franz Olschewski (Trip)				
#6 Statement of Robert J. Brimi, Capt. (Trip)				
#7 Record of Previous Convictions (Trip)				
24				
Statements of Witnesses				
25 December 1946				
Elisabeth R E H M, born 24 January 1929 at Stutt- gart, single, Protestant, laborer, residing at Stuttgart Feuerbach, Rudiger Street 4/11. German Civilian				
6.				
Ich bin um 2000-Uhr mit Eugene Brown in das Wach- haus des MotorPools in Feuerbach, Leonberger Strasse				

35 (1) REPORTER. (Certificate as applied to old Form 339.)

I certify that M Sgt Edgar T. Lothrop, 33374223 was employed by me as a reporter for reporting trial by general court-martial, under the attached authority, and that the account for his services as stated is correct.

RICHARD G. KANE

Captain MAC
(Official title)

Trial Judge Advocate

(2) MEDICAL ATTENDANCE OR HOSPITAL CARE AND TREATMENT. (Certificate as applied to old Form 353 and 355.)

I certify that the account as stated on the face hereof is correct; that the services were rendered and the medicines furnished in the care and treatment of the persons named; that they were necessary for the public service; that, of the said persons, the officers, enlisted men, contract surgeons, and nurses were on duty, the prisoners were in military custody, and the applicants for enlistment were held under observation at the time and place of treatment specified; that the services of a medical officer or contract surgeon of the Army could not be obtained because _____; or that treatment in civil hospital was necessary, no Army hospital being available, and was ordered by _____

(Official title)

(3) EXAMINATION AND VACCINATION OF RECRUITS. (Certificate as applied to old Form 354.)

I certify that the account as stated on the face hereof is correct; that the services were rendered; that they were necessary for the public service; that the men examined were applicants for enlistment, and the men vaccinated were recruits enlisted and duly sworn, or applicants accepted for enlistment; and that the services of a medical officer or contract surgeon of the Army could not be obtained because _____

(Official title)

(4) NURSING. (Certificate as applied to old Form 356.)

I certify that the services of a nurse were indispensable to the proper care of the patient named on the face hereof:

gegangen, denn Brown hatt von 2000 Uhr bis 2200 Uhr Posten. Ich sass auf einem Stuhl und Warmte mich, als zwei Polen hereinkamen und wollten sich wasrscheinlich auch warmen. Sie sagten zu mir "Gruess Gott. Fraulein, "Da wurde Brown zornig und ging mit einer Pistole in der linken und einem Karabiner in der rechten Hand gegen die Polen haltend auf diese zu und rief sie in deutscher Sprache an "Raus", was sie auch taten. Das Weitere habe ich nicht gesehen. Ich harte einen Schuss. Dann schaute ich Zum Fenster hinaus und sah einen Polen am Boden liegen und stoehnen. Dann kam Eugene Brown wieder herein mit der Pistole in der Hand, Als ich ihm nachher sagte, dass es nicht gut sei, was er gemacht hatte, warf er mich auch heraus. Aussen traf ich einen deutschen Polizisten, dem ich den Vorfall berichtetts. Mit ihm ging ich dann zum 15. Polizeirevier, von wo aus die MP benachrichtigt wurde.

ELISABETH REHM.

Translation:

I went with Eugene Brown at 2000 hours in the post house of the Motor Pool in Feuerbach, Leonberger Street, where Brown was on duty from 2000 hrs to 2200 hrs. I was sitting on a chair and warming up myself, when two pollacks came in and wanted to get warmed up too. They said to me: Hello Miss". Brown got mad and holding in his left hand an pistol and in his right one a rifle he walked towards the poles and hollered in German: "Raus" which they did. What happened after that I did not see. I heard a shot, after that I looked out of the window and seen a pollack laying on the ground and groaning. Brown came into the room back again, still having his pistol in hands. As I told him that it was not good, what he had done, he threw me out also. Outside I met a German Police man and I told him what happened. Together with him I went to the German Police Department and the MP's were notified.

signed ELISABETH REHM

25 December 1946

Stuttgart

A True Copy:

C. T. ANDREWS

C. T. Andrews

Capt.. Ord. Dept.

25

Statement

of Pvt Richard Eugene Stone, 45056411
994th Ord HAM Co, APO 172

This man had just relieved me from my post, I then went to my room to retire. I then heard a shot fired. My friend was in the room with me. We both run to see what was wrong. This GI, which relieved me, walked out of the guard-house with a pistol in his hand. We then saw a pol-lack lying on the ground. We then run out to the parking lot, we found a truck that would run. We lifted this wounded man into the rear of the truck and rushed him to the hospital. He died shortly after we reached the hospital. When this GI came to relieve me, he had a girl with him. She waited outside the gate. He relieved me about 10 minutes before 20:00 hrs. He told me that I could go on into my room and go to bed and so I went to my room.
Stuttgart, 26 December 1946

/s/ RICHARD E. STONE

Signature

Certified true Copy

C. T. ANDREWS

C. T. Andrews

Capt Ord

Adjutant

26

Statement

26 December 1946

of Pfc. Carl A. OAKS, ASN 35998364, 99th Ord
HAM Co, APO 172

Last night at about 2000 hrs me and my buddy were in the billets. We heard a shot. We went out to see what it was. The guard came from the guard-house and had a pistol in his hands, I looked toward the guard-house I saw the Polish man lying on the ground. I picked him up and took him inside, lay him on a cot and went out to start a truck. We had trouble with starting the trucks, delayed us from taken him to the hospital. There was a girl in the guard-house. I saw that he had been shot. I rushed him as quick as I could to a hospital. He died about 15 minutes later after we were at the hospital. The soldier was drinking, I believe.

/s/ CARL A. OAKS

Pfc. Carl A. Oaks

ASN 35998364, 994th Ord.

HAM Co, APO 172

that the nurse was competent; that the services were rendered as claimed; and that the charges do not exceed those customary in this vicinity for competent nurses.

....., M. D.,
Attending Physician.

I certify that the account as stated on the face hereof is correct; that the patient named therein was (on duty) (in military custody) (held under observation) at the time and place specified; and that care in an Army hospital or by a properly qualified attendant of the Medical Department could not be obtained because _____

(Official title)

(5) FITTING ARTIFICIAL LIMBS. (Certificate as applied to old Form 374.)

I certify that the above examinations and fittings were necessary for the public service; that the records of this office show that they were made by the claimant; and that the fees claimed do not exceed those authorized by the Surgeon General for such service. This voucher is approved by order of the Surgeon General.

(Official title)

(6) PAYMENT OF REWARD FOR APPREHENSION OF DESERTER OR ESCAPED MILITARY PRISONER. (Certificate as applied to old Form 349.)

I certify that the person named on the face hereof has arrested and this _____ day of _____, 19____, actually delivered to me the before-named _____ (an escaped military prisoner) or (a deserter from the military service) of the United States and is entitled to the authorized reward for said service, and that _____ has no right to claim exemption from trial and punishment for desertion under the provisions of Article 39, Articles of War (39 Stat. 656)

(Signature of officer)

(Official designation)

Certified true Copy.

C. T. ANDREWS
C. T. Andrews
Capt Ord
Adjutant

27 *Statement*

of OLSCHEWSKI, Franz, born 7 December 1914 in Buszeck/Poland Polish Citizen, residing in Essligen Neckar, Funkernkaserne

On the 25th of December 1946 I and my friend KOWALSCZYK (first name unknown) were on guard at the American Motor Pool 994 in Stuttgart Feuerbach at about 2015 hours when the following incident took place: I and my friend entered the Motor Pool, which was in a barrack and when an American soldier was on guard. When we came into that barrack we both saluted. The American guard, who was accompanied by a German girl, stood up immediately, injected a shell into the chamber put the pistol on the chest of Kowalsczyk with the following words: You ver-setehen was das Heisst "Raus:" (Do you understand what this means—raus" We both left the room without saying a word. When we were outside I said to this American "It is OK boy." Thereupon he fired a shot and it struck my friend in the shoulder. My friend made a few steps and collapsed. I went to a house, where other Americans are living, to get some help. In the staircase I met 2 Americans who tried to leave the building very fast. They are not known to me. I notified the MP's from the German Police Station in Feuerbach and the MP's brought me to the MP Headquarters in Stuttgart, 20 Weimer Street. The German girl was brought to the same station by a German Police patrol. I can not say more about this incident. I am not able to name any witnesses.

signed OLSCHEWSKI, FRANZ

Certified true Copy:

C. T. ANDREWS
C. T. Andrews
Capt Ord Dept
Adjutant

This account is hereby approved for \$_____, and the commander of the company or detachment to which the deserter belongs has been officially notified.

(Signature of approving officer)

(Official designation)

*Omit this clause if voucher is on account of an escaped military prisoner.

36 WD Form 335a

ITEMIZED SCHEDULE OF ALLOWANCES CLAIMED

<i>Date</i>	<i>Character of Services Rendered</i>	<i>Rate</i>	<i>Amount</i>
9 Jan 47 to 14 Jan 47	Reporting GCM case of Technician 5th Grade Eugene P. Brown, 38 001 224, 994th Ordnance HAM Company, 178th Ordnance Battalion Esslingen, Germany GCM appointed by Par. 2, SO 273 Hq. CBS, USFET, ETO, dated 7 December 1946 For transcribing notes for making that portion of original record which is required to be typewritten, 12,000 words	10¢ per 100 words	\$12.00
	Total		\$12.00

WAR DEPARTMENT
Form 225
Approved by Comptroller of Treasury
July 25, 1919

WAR DEPARTMENT
PUBLIC VOUCHER
PERSONAL SERVICES

VOUCHER NO.

STAMP HERE
NAME, DESIGNATION, AND STATION
OF DISBURSING OFFICER

APPROPRIATION:..... ITEM No. \$.....

APPROPRIATION:..... ITEM No. \$.....

THE UNITED STATES.

To M Sgt Edgar T. Lethrop, 33374223, Dr.

Address Hq CBS USFET, Office of the SJA

DATE		CHARACTER OF SERVICES	NUMBER OF HOURS	RATE	AMOUNT	
From	To					
9 Jan	14 Jan	For reporting trial by general court- Under authority of <u>Per. 2, 80 273, R. 025, 051</u> Dated <u>7 December</u> , 19 <u>46</u> Per attached certified statement, Form 335a, which is hereby made a part of this voucher whenever used. Less deduction for.....	12.000	100	12	00
NET AMOUNT OF THIS VOUCHER					12	00

MEMORANDUM VOUCHER

(To be filled in and retained by paying officer)

Voucher certified by.....

Voucher approved by.....

EXAMINED BY

des polnischen Staatsbuergers OLSCHESKI, Franz,
geboren 7.12.1914 in Buszeck/Poien wohnhaft in Esslingen
am Neckar Funkerkaserne

Am 25.12.46 befand ich mich zusammen mit meinem
Freund KOWALSCZYK (Vorname unbekannt) gegen 20.15
Uhr in Stuttgart/Feuerbach im amerikanischen Motor-
Pool 994 als Wachtposten, wo wir Fahrzeuge zu bewachen
hatten, als sich folgendes abspielte.

Gemeinsam mit meinem Freund betrat ich diesen Motor-
Pool wo ein unbekannter amerikanischer Soldat Torwache
hatte, welche in einer Holzbaracke untergebracht war. Wir
betraten diese Baracke und ich gebot zuerst den "Guten
Abendgruss" worauf auch mein Freund "Gruess Gott"
sagte. Daraufhin erhob sich der amerikanische Wacht-
posten, der Besuch von einem deutschen Maedchen hatte,
lud seine Pistole and setzte sie mit den folgenden Worten
auf die Brust "You verstehen was das heisst—Raus!"
Ohne ein Wort zu sagen, gingen wir beide daraufhin wieder
hinaus. Draussen sagte ich zu diesem Amerikaner die
folgenden Worte: "Boy is OK" Darauf schoss derselbe
auf meinen Freund, den er in die rechte Schulterhaelfte
traff. Mein Freund ging noch einige Schritte und fiel
darauf zu Boden, waehrend ich zu einem von Amerikanern
bewohnten Haus ging, um mir Hilfe zu holen. Im Hausflur
stiess ich mit zwei anderen Amerikanern zusammen, die
jedoch fluchtartig das Haus verliessen, sie sind mir auch
nicht naeher bekannt. Von der deutschen Polizeiwache in
Feuerbach aus benachrichtigte ich die MP, die mich bald
darauf in die Deimarstrasse 20 brachte. Das deutsche
Maedenchen brachte eine vorueberpatrouillierende deutsche
Polizei auf dieselbe Polizeiwache. Mehr weiss ich nichts
zu sagen. Ebenfalls bin ich nicht der Lage irgendwelche
Zeugen aufzufuehren.

gez.: OLSCHESKI, FRANZ
/s/

Certified true copy

C. T. ANDREWS
C. T. Andrews
Capt Ord
Adjutant

Sworn Statement

of Technician Fifth Grade Eugene P. Brown, RA 34 001 224. 994th Heavy Automotive Maintenance Company, APO 172, US Army taken at time of pretrial investigation.

At about 2000 hours, December the 25th 1946. I relieved the sentry at Feuerbach. Being on guard few minutes I called this girl Elisabeth Rhem which came from her home with me. Her, having sandwiches of mine in her bag. After coming in, I told her to sit down while I got the fire burning in the stove. While being bent over, two (2) Polish came in the door and started talking to this girl. I don't know what they was talking about because I do not understand Polish. One Soldier had his hand on this girls shoulder I told him if that is what he came in for to get out, which he did not do for a few seconds. When I straightened up from the fire, one (1) Polish stuck his fist out glancing me on the upper lip. Then they both walked out aoutside the door and stopped. Me not knowing what they were up to. My Carbine was not loaded. Having a 45-Cal pistol behind the coal-box I walked to the door, The Polish Soldier was about three (3) feet to the left of the door and swung at me two or three times with a bottle which I dodged, being higher then he was. Then I loaded my gun and as he swung around again I shot. The Polish Soldier went behind the Guard house and there fell dropping the bottle about four (4) feet from the door. Then I went out the door and called Pvt. Oaks telling him, to bring my flashlight. While he was coming I walked back in the Guard house, loaded my Carbine and put the Pistol back behind the Coal-box. Then walking out Pvt. Oaks and me walked around to were this Polish Soldier was laying. I then told Pvt. Oaks to get a Truck and take him to the Hospital. Pvt. Oaks said, "he had no truck". I then told him to get any Truck in the lot this, was an emergency. I then walked back in the guard house picking the bottle off of the ground and set it down by the door. Then told Elisabeth to go on home. She walked out the door.

I told the Sergeant of the Guard not to let anyone the bottle, that I was going with the M.P's. This M. P. Lt. asked me where was my gun. I started to give him a souvenir weapon too, thinking he would want both. He then told me to get the one I shot. Going back to the Guard house with him I got the 45-Cal. from behind the coal-box

and handed it to him. I pointed out the bottle in question to the Sergeant of the Guard with my toe.

EUGENE P. BROWN

Eugene P. Brown

Tec/5 34001224

994th H.A.M. Co.

Exhibit "A"

30

LABORATORY

387th Station Hospital
APO 154 U.S. Army

27 December 1946

To Whom It May Concern:

This is to certify that an autopsy was performed on the body of Josef Kowalezyk, Pfc. Polish Guard of the 4222 Labor Supervision Company (under the 1010 L.S.Co.) on the 26 December 1946.

The cause of death was internal massive hemorrhage from a gun-shot wound of the right chest and abdomen. The bleeding came from the perforated intercostal vessels of the 9th right interspace, from the perforated right lower lung lobe, from the liver which was perforated, from the inferior vena caval vein, from the portal vein both of which were perforated, and from some small vessels of the anterior abdominal wall. The duodenum and head of the pancreas were also perforated as was the small intestine (jejunum) which was perforated in four places.

A copper covered steel jacket 0.45 caliber bullet measuring 11 millimeters in diameter was found just below the skin of the left upper quadrant of the abdomen. The Wound of entrance was in the back of the right side of the chest just to the right of and below the tip of the scapula at the level of the 9th rib which was fractured by the bullet.

s/ ROBERT J. BRIMI

Robert J. Brimi

Capt MC

Pathologist

The above mentioned 0.45 caliber bullet was turned over to Agent Chester T. Rafalko on this date, 27 December 1946. It is identified by my initials, R B carved on the base and was removed by me from the body.

s/ ROBERT J. BRIMI

Robert J. Brimi

Capt MC

Pathologist

✓ RECORD OF TRIAL

(Proper)

of

BROWN

(Last name)

EUGENE P.

(First name and middle initial)

RA 34001224

(Army serial No.)

TECHNICIAN FIFTH GRADE

(Grade)

- 994th ORDNANCE HAM Co., 178th ORDNANCE BATTALION

(Organization)

ESSELINGEN, GERMANY

(Station)

By

GENERAL COURT MARTIAL

Appointed by the Commanding Officer

HEADQUARTERS CONTINENTAL BASE SECTION
UNITED STATES FORCES EUROPEAN THEATER

Tried at

MANHEIM, GERMANY

JANUARY

, 19 47

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Arraignment	4
Plea	5, 6
Statement by accused (See witnesses)	
Findings	47
Sentence (or acquittal)	48
Proceedings in revision	

TESTIMONY

A true Copy

JOHN E. GRINDELL
John E. Grindell
Chief Agent 481 CID

31 Evidence of, No. Previous Convictions
in case of
Brown Eugene P. RA 34 001 224,
(Last name of accused) (First name) (Middle Initial) ASN (Rank)
994th Ord Ham Co
(Organization)

Date of current enlistment: 17 November 1945

Date of offense here charged: 25 December 1946

I certify that I am the official custodian of the service record of the above named accused and that the following record of trials by courts-martial are true extract copies of all entries therein relating to previous convictions which relate to offenses committed during the current enlistment of the accused and *(within one year preceding the commission of the offense here charged) (prior to one year preceding the commission of the offense here charged).

The record of trials by courts-martial as set forth below discloses No conviction(s)

EXTRACT COPY OF SERVICE RECORD OF ACCUSED
RECORD OF TRIALS BY COURTS-MARTIAL

None CM AW /194
(No.) (Date of offense) (Synopsis of

specifications)

Sentence announced and adjudged: 194

Sentence as approved:

I certify that the above is correct:

(Name, Rank and Organization of Personnel
Officer—Custodian of S/R)

CM AW /194
(No.) (Date of offense) (Synopsis of

(specifications)

Sentence announced and adjudged: 194

Sentence as approved:

I certify that the above is correct:

C. T. ANDREWS

C. T. Andrews

Capt., Ord. Dept., Adjutant, 178th Ord Bn.

[illegible]

I hereby acknowledge receipt of a carbon copy of the above described record of trial,
delivered to me at Mannheim, Germany
this ^{25th} 11th day of February, 1947

Eugene P. Brown
(Signature of accused)

40 PROCEEDINGS OF A GENERAL COURT MARTIAL
which convened at Mannheim, Germany pursuant to
the following order —:

HEADQUARTERS
CONTINENTAL BASE SECTION
U. S. FORCES, EUROPEAN THEATER

APO 807
7 December 1946

SPECIAL ORDER }
NUMBER 273 }

EXTRACT

2. A GCN is aptd to meet at Mannheim, Germany, or at such other place as the President of the Court may designate, at 0900 hours on 11 December 1946, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT

Col	JAMES E. BUSH	0-10332	FA	558th QM Grp Law Member
Lt Col	STEPHEN G. LEFNER	0-112351	TC	476th QM Grp (TC)
Lt Col	HAROLD D. THURBER	0-422198	Ord	60th Ord Grp
Lt Col	BYRON D. GREENE	0-900785	TC	11th Traffic Reg Grp
Major	WILLIAM D. VAN ARNAM	0-189138	QMC	558th QM Grp
Major	MITCHELL Z. BROWN	0-281290	QMC	558th QM Grp
Major	GIBSON S. PETERSON	0-363994	Cav	476th QM Grp (TC)
Major	LOUIS S. LEATHAM	0-385131	TC	6th TC Bn
Major	FRANK R. TWIST	0-265653	Sig	22d Sig Sv Grp
Major	IVAN H. HARRISON	0-1011440	Inf	61st QM Bn
Capt	CLYDE R. MILLS	0-415788	Inf	103d Lb Sup Center
Capt	RALPH L. WHITMORE	0-422201	MAC	62nd Field Hospital
Capt	NIEL S. WILSON	0-1056610	TC	3478th TC Truck Co
Capt	RICHARD G. KANE	0-2048030	MAC	Hq, CBS Trial Judge Advocate
Capt	JACK H. CHALKLEY	0-448422	JAGD	Hq, CBS Asst Trial Judge Advocate
Capt	JOHN E. ROYSTON	0-1000660	AGD	558th QM Grp, Asst Trial Judge Advocate
Major	LAWRENCE RUSSELL	0-264382	Inf	558th QM Grp Defense Counsel
Capt	HARRY I. FERNANDES	0-389982	Inf	4004th TC Trk Co Asst Defense Coun- sel
1st Lt	HENRY R. SLADE	0-357744	Inf	Mannheim Mil Com Asst Defense Coun- sel

THE UNITED STATES.

To **Mr. Edgar T. Lathrop, 33074223, Dr.**

Address **Mr. LATHROP, Office of the SJA**

STAMP

DATE	CHARACTER OF SERVICES	NUMBER OF HOURS	RATE	AMOUNT
9 Jan 24 Jan	For reporting trial by general court- Under authority of P.W. 2, 22 275, P. 2, 22 275, P. 2, 22 275 Dated 7 December, 1946 For attached certified statement, Form 335a, which is hereby made a part of this voucher whenever used. Less deduction for	12.000	10¢ 100	12 00
NET AMOUNT OF THIS VOUCHER				12 00

I certify that the above bill is true and correct, and that payment thereof has not been received, or (that I am not related to the patient named on certificate).

EXAMINED BY

(DO NOT SIGN IN DUPLICATE) **Edgar T. Lathrop**

In cases where certificate below does not apply, the Certifying Officer must sign proper certificate on reverse hereof, and enter the number of the certificate signed (_____).

The certificate thus accomplished becomes a part of this voucher.

I certify that the foregoing account is correct; that it appears from the records of my office that the person named thereon was legally appointed or employed; that he has performed the service required by law and the regulations of the War Department during the period mentioned; that such service, except as otherwise indicated on attached statement, has been performed under my supervision; that the person whose name appears in the foregoing voucher is not paid for any period of absence in excess of that allowed by law; that he is entitled to the amount of pay stated above, and that any detail is indicated on statement attached hereto.

Approved for \$ **12.00**

RICHARD G. KANE
Captain **MAC**
Trial Judge Advocate

RICHARD G. KANE
Captain **MAC**
Trial Judge Advocate

Date **7 February**, 19**47**

Paid by check No. _____, dated _____, 19____, for \$ _____

Received _____, 19____, of _____, in CASH, the sum of _____ dollars and _____ cents, in full payment of the above account.

(DO NOT SIGN IN DUPLICATE) _____

\$ _____

3-7071

All unarraigned cases in the hands of the Trial Judge Advocate, of the GCM appointed by par 5, SO 244, corrected copy, this Hq, 1 November 1946, will be brought to trial before the Court hereby appointed.

The employment of a civilian reporter is authorized.

By COMMAND OF BRIGADIER GENERAL BRESNAHAN:

W. K. GHORMLEY
Colonel, GSC
Chief of Staff

Classification

Cancelled ~~Changed to~~

By Authority of TJAG

By CHARLES P. BERKOWITZ
CPB

Major, AGD

Date Jul 12 1948

OFFICIAL: THOS E. P. BARBOUR

Thos E. P. Barbour

Colonel, AGD

Adjutant General

Hq. CONTINENT

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41

Mannheim, Germany

(Place)

9 January, 1947

(Date)

Organization of the Court

The court met pursuant to the forgoing order — at 11:10 o'clock A. M.

PRESENT

Col	JAMES E. BUSH	0-10332	FA	558th QM Grp Law Member
Lt Col	STEPHEN G. LEFNER	0-112351	TC	476th QM Grp (TC)
Lt Col	HAROLD D. THURBER	0-422198	ORD	60th Ord Grp
Lt Col	BYRON D. GREENE	0-900785	TC	11th Traffic Reg Grp
Major	LOUIS S. LEATHAM	0-385131	TC	6th TC Bn

Major	FRANK R. TWIST	0 265653	SIG	22d Sig Sv Grp
Major	IVAN H. HARRISON	0-1011440	INF	61st QM Bn
Capt	CLYDE R. MILLS	0-415788	INF	103d Lb Sup Center
Capt	RAIPH L. WHITMORE	0-422201	MAC	62nd Field Hospital
Capt	RICHARD G. KANE	0-2048030	MAC	Hq. CBS, Trial Judge Advocate
Capt	JOHN E. ROYSTON	0-1000660	AGD	558th QM Grp, Asst. Trial Judge Advocate
Major	LAWRENCE RUSSELL	0 264382	INF	558th QM Grp, Defense Counsel
ABSENT				
Major	WILLIAM D. VAN ARNAM	0-189138	QMC	558th QM Grp (Trans)
Major	MITCHELL Z. BROWN	0 281290	QMC	558th QM Grp (Trans)
Major	GIBSON S. PETERSON	0-363994	CAV	476th QM Grp (TC) (Trans)
Capt	NIEL S. WILSON	0-1056610	TC	3478th TC Truck Co. (VOEG)
Capt	JACK H. CHALKLEY	0 448422	JAGD	Hq. CBS, Asst. Trial Judge Advocate (VOCG)
Capt	HARRY I. FERNANDES	0-389982	INF	4004th TC Trk. Co., Asst. Defense Counsel (Trans)
1st Lt	HENRY R. SLADE	0-357744	INF	Mannheim Mil Com., Asst. Defense Counsel (Trans)

The court proceeded to the trial of T/5 Eugene P. Brown, 34 001 224 994 Ordnance HAM Company, who, on

(Grade) (Name)

(Army serial number) (Organization)

appearing before the court, was asked by the trial judge advocate whom he desired to introduce as counsel.

42 The accused stated he desired to be defended by the regularly appointed defense counsel.

M Sgt. Edgar T. Lothrop was sworn as reporter.
Ursula Michel was sworn as interpreter.

PROSECUTION TO ACCUSED: Do you want a copy of the record?

ACCUSED: Yes.

The trial judge advocate then announced the names of the members of the court present and absent.

The trial judge advocate then announced the names of the accuser, the investigating officer, officers who forwarded the charges and any members of the court who would be called as witnesses for the prosecution as follows: The general nature of the charge is murder. The charges were

preferred by Captain Robert E. Byrne, JAGD; were investigated by Major James G. Kleese, Ord., and were forwarded by Captain Paul Phillips, Ord. Dept.

No member of the court will be a witness for the prosecution. Further, the records disclose no grounds for challenge of any member of the court by either the prosecution or the defense.

PROSECUTION: If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member, it is requested he state such facts.

PRESIDENT: Apparently there are none.

PROSECUTION: The prosecution has no challenges.

PROSECUTION TO ACCUSED: You now have the right to challenge any member or members of the court for cause, and any one member, other than the law member, peremptorily.

DEFENSE: The defense has no challenges.

The accused was then asked if he objected to any other member present, to which he replied in the negative

43 **RGK.**

The members of the court and the personnel of the prosecution were then sworn.

Arraignment

The accused was then arraigned upon the following charges and specifications:

CHARGE: Violation of the 92nd Article of War.

SPECIFICATION: In that, Technician Fifth Grade Eugene P. Brown, 994th Ordnance HAM Company, did, at Fenerbach, Germany, on or about 25 December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Josef Kowalsczyk, a human being, by shooting him with a pistol.

PROSECUTION: The affidavit and 1st indorsement are apparently in proper form.

The charges were served on the accused on 3 January 1947.

44

/s/ **ROBERT E. BYRNE**

(Signature of accuser (Typed))

/t/ **Robert E. Byrne**

(Name (Typed))

**Captain, JAGD, Hq., Continental
Base Section**

(Grade, organization, or arm or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser, this 30th day of December, 1946, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he

(Indicate by specification

_____ ; investigated the matters set forth and charge numbers)

in specification of the Charge, and that the same are true

(Indicate by specification and charge numbers)

in fact, to the best of his knowledge and belief.

/s/ GERALD A. SAMS

(Signature (Typed))

/t/ Gerald A. Sams

(Name (Typed))

Captain, JAGD, Asst. Trial Judge

Advocate, CBS

(Grade and organization)

.....
(Official character as summary court, notary public, etc.)

1st IND.

Headquarters Continental Base Section, Bad Nauheim
(Place)

Germany, 30 December, 1946

(Date)

Referred for trial to Captain Richard G. Kane.

(Grade, name, and organization of trial judge advocate)

Trial Judge Advocate of general court-martial appointed by Paragraph 2, Special Orders No. 273, Headquarters C. B. S. Bad Nauheim Germany, 7 Dec., 1946.

By command of BRIGADIER GENERAL BRESNAHAN.

(Grade and name of commanding officer)

/s/ C. J. KLEINEGGER, Adjutant.

/t/ C. J. Kleinegger

Major AGD

Asst. Adj. Gen.

PROSECUTION: I now ask the accused if he has any special pleas or motions and advise him that they should be made at this time.

DEFENSE. No special pleas or motions.

The accused then pleaded as follows:

To the Specification: Not Guilty

To the Charge: Not Guilty.

THE UNITED STATES.

To M Sgt Edgar T. Lethrop. 33374223, Dr.

Address Hq CDS USFET, Office of the SJA

STATION
CER

DATE	CHARACTER OF SERVICES	NUMBER OF HOURS	RATE	AMOUNT
From <u>1947</u> To <u>1947</u>			<u>104</u>	
9 Jan 14 Jan	For reporting trial by general court- Under authority of <u>Par. 2, SO 273, H. QMS, USFET</u> Dated <u>7 December</u> , 19 <u>46</u> Per attached certified statement, Form 335a, which is hereby made a part of this voucher whenever used. Less deduction for	<u>12,000</u>	<u>100</u>	<u>12 00</u>
NET AMOUNT OF THIS VOUCHER				<u>12 00</u>

MEMORANDUM VOUCHER

(To be filled in and retained by paying officer)

Voucher certified by

Voucher approved by

EXAMINED BY

Paid by check No., dated, 19...., for \$.....

HEADQUARTERS CONTINENTAL BASE SECTION
UNITED STATES FORCES EUROPEAN THEATER

Tried at

MANNHEIM, GERMANY

JANUARY

-, 19-47

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TESTIMONY

[illegible]

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I hereby acknowledge receipt of a carbon copy of the above described record of trial,
delivered to me at Mannheim, Germany

this ^{RSK.} 11th day of February, 19 47

Eugene P. Brown
(Signature of accused)

15-5072-1

PROSECUTION. Does the court or defense desire any parts of the Manual or other publications read at this time?

PRESIDENT. The court does not.

DEFENSE. The defense does not.

PROSECUTION. The prosecution has no opening statement to make but will call as its first witness Franz Olschewski.

FRANZ OLSCHIEWSKI, a Polish soldier, a witness for the prosecution, was sworn and testified, through the interpreter, as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. What is your name?

A. Franz Olschewski.

Q. Where do you live?

A. Esslingen, Nackar.

Q. What is your occupation?

A. Guard, Labor Supervision Company 1010.

Q. Do you know the accused in this case?

A. Yes.

Q. If he is present in the courtroom will you indicate him to the court by pointing your finger at him?

A. Yes.

Q. Will you do that?

A. (Witness indicated.)

PROSECUTION. Let the record disclose that the witness pointed to the accused, Brown.

Q. What is his name, if you know?

A. Brown.

DEFENSE. The defense takes exception to the fact that on identifications, where Nationals are concerned, the interpreter is in the habit of pointing in the direction of the defense.

PRESIDENT. Will the interpreter remain perfectly rigid when questions of identification are asked.

46 PROSECUTION (continuing with direct examination).

Q. On or about the 25th day of December 1946, will you state to the court any unusual happenings that occurred to you?

A. Yes, I can do that.

Q. Will you do that?

A. I was there as the Sergeant, with nine men of the guard, at the guardhouse. I was there in the evening—Kowalsczyk was there too—he was one of the guards.

Q. What is Kowalsczyk's first name, if you know?

A. I don't know that—I was there with him.

Q. When you say you were "there" with Kowalsczyk, where do you mean by "there"?

A. In the house where he had to die.

Q. In what town is the house located?

A. Feuerbach, in the motor pool—the 994th Ordnance Motor Pool.

Q. The 994th Ordnance HAM Company?

A. Yes.

Q. Is this city referred to as Feuerbach—is that located in Germany?

A. Sure.

Q. What, if anything, happened at that time?

A. I was walking along with Kowalsczyk on the street and then I came back with him, and then we went into the house where he was on guard, Brown there. There was a girl with him when I came in and then I said "good evening", in German, and then Brown gets up and drew a pistol from this side, the right hand side, and then he pushed me here and said "you understand what that is?"

Q. When you say he pushed you here, what do you mean?

A. Here (indicating).

PROSECUTION. May the record disclose that the witness indicated the lower portion of his left chest.

Q. With what did he push you?

A. With the pistol—with the barrel.

Q. He actually placed the barrel of the pistol against your left breast?

A. Yes.

PRESIDENT. The court would like to clarify one point—who does the accused mean by "he".

47 Q. When you said that somebody placed a pistol against your left breast who do you mean pushed you with it?

A. Brown.

Q. By Brown, will you indicate him to the court who you mean?

A. (Witness indicated.)

PROSECUTION. May the record disclose the witness again indicated the accused Brown.

Q. What, if anything, was said at the time the pistol was placed against your breast?

A. "You understand what that is".

Q. And then what happened?

A. I was standing—I looked into his eyes like this, and then he drew his pistol back like this (indicating) and then he said in German “Get out”.

PROSECUTION. Let the record indicate that when the witness stated “he drew his pistol back like this” that the accused removed the pistol from the original position which was placing the gun against his breast, and brought the pistol to the level of his hips in a 45° arc.

Q. Then what happened?

A. I and Kowalsczyk went out without saying a word.

Q. Then what happened?

A. Brown came to the door with the pistol in his hand—he was waiting at the door. Kowalsczyk turned around in order to go away and I say to—I said to Brown, “Boy, it is OK what you do” and at this moment Brown fired between us.

Q. Did you see Brown actually fire the pistol?

A. Yes.

Q. What kind of a pistol was it, if you know?

A. Well, that may be an American Colt, or a Belgium pistol.

Q. How far from you and Kowalsczyk was Brown standing when he fired the pistol?

A. One meter.

Q. Will you state to the court in which direction the gun was pointing at the time it was fired, up in the air, down at the floor, backwards, forwards, or what?

A. I cannot tell that for sure. I can say he had the pistol in his hand like this (indicating) in the direction between us.

PROSECUTION. Let the record disclose that the witness indicated that the accused held the pistol in his hand and extended his hand from the body parallel with the ground and extended directly forward.

Q. How close were you and Kowalsczyk standing together?

A. About half a meter apart.

Q. What, if anything, happened as a result of the shot?

A. I cannot say anything else—the shot was fired and Kavalchick walked on and I walked away too.

Q. How far did Kowalsczyk walk, if you know?

A. He walked about ten steps.

Q. Then what did he do?

A. Then he held himself like this (indicating) and then he fell to the ground.

PROSECUTION. Let the record show that when the witness stated "he held himself like this" he grasped the upper quadrant of his abdomen and leaned forward.

Q. After he fell to the ground what did he do, if you know?

A. I don't know because I was running away to get a doctor, because then I knew he was hit.

Q. Were there any other shots fired at that time?

A. No.

Q. Had either you or Kowalsczyk done anything at all to the accused with regards to violence or threats?

A. No.

Q. Did either you or Kowalsczyk have a bottle of any description?

A. No.

Q. Did you observe the accused Brown closely enough to be able to state to the court whether or not there was alcohol on his breath?

A. No, it happened too fast.

Q. Have you ever seen your friend Kowalsczyk since that time—since the time he collapsed after the shot was fired?

A. No.

LAW MEMBER. Will the prosecution refrain from asking leading questions of the witness—I mean questions the answers to which will necessarily be yes, or no.

PROSECUTION. The prosecution feels that the last question asked was a perfectly proper question. Certainly the witness is capable of testifying as to whether or not he saw his friend after the shot was fired.

PRESIDENT. Will the prosecution refrain from asking questions which may be answered by "Yes" or "No".

Q. After you saw your friend collapse, what did you do?

A. Ran away fast to get a doctor and to tell the guards what happened—there were two men there.

49 Q. Did you report the incident to a doctor and to the police?

A. To the German police, but when I came to the police this girl there was at the police station.

Q. To whom do you refer by "this girl"?

A. The girl who was sitting in the house with Brown.

Q. Can you tell the court what kind of a house this is you refer to where Brown and the girl were sitting?

A. That is like this—it is kind of a tent where there is a repair shop but now is a guardhouse.

Q. It is a guard house?

A. Yes.

Q. This was on the 25th of December 1946?

A. Yes.

Cross Examination.

Q. Did you ever make a statement on the 27th of December 1946 concerning this incident?

A. Yes.

Q. Do you recall stating at that time that an "American guard stood up and injected a shell into the chamber and put the pistol on the chest of Kavolsezyk?

A. No.

Q. You don't recall saying that in your statement?

A. No, not in my statement.

Q. Do you recall saying that you went to a house where Americans were living to get some help instead of going to the German police station, as you have just testified?

A. It was like this—when I made the statement there was an interpreter and he speaks Russian and I don't talk Russian and he took the statement and he didn't understand me. I only went into the house where these Americans, American soldiers are living, and I met two in the hallway, because they came out when they heard the shot fired.

Q. You say that now, and a minute ago you said you went to the police station first?

A. Sure, when I met these men I ran for a doctor and to the police station.

Q. Then you want to change your testimony about that—you went to the American house first, then to the doctor and then to the police?

A. I cannot change it—I can only tell how it was, because in the second statement I made with a German interpreter I said how it was and they got the right statement.

Q. What date was that second statement made?

A. Twenty-five, twenty-six, the twenty-seventh in the morning.

50 — The court did not desire to examine the witness.
There being no further questions the witness was excused and withdrew from the courtroom.

ELIZABETH REHM, a German civilian, a witness for the prosecution, was sworn and testified, through the interpreter, as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. What is your name?

A. Elizabeth Rehm.

Q. Where is your home address?

A. Feuerbach, Stuttgart.

Q. Do you know the accused in this case?

A. Yes.

Q. If he is present in the courtroom will you indicate him to the court by pointing your finger at him?

A. (Witness indicated).

PROSECUTION. Let the record disclose that the witness pointed to the accused.

Q. What is his name, if you know?

A. Eugene Brown.

Q. On or about the 25th of December 1946 did you see the accused Brown anywhere?

A. No.

Q. When was the last time you saw Brown?

A. When the incident happened and the day after that—I don't know when that was.

Q. When you say "the incident happened", will you tell the court what you mean by that?

A. I saw him the next day too.

Q. Drawing your attention to the day before, did anything unusual happen?

A. No.

Q. Have you ever been in a building of any description with Brown when Polish guards were present?

DEFENSE. Object—it is a leading question.

LAW MEMBER. Objection sustained.

Q. Will you tell the court if, on or about 25 December 1946, anything unusual happened?

A. You mean when he was shot?

Q. Yes.

A. Yes.

51. Q. Where were you?

A. I was in the little house with Brown.

Q. Where was this little house located—in what town?

A. Feuerbach.

Q. Who else was present in that little house?

A. Eugene Brown.

Q. Was there anybody else in the house?

A. No.

Q. When you were in the little house with the accused Brown, did anybody come into the house at any time?

A. Yes.

Q. Did you, at the time you have testified you were in the house with Brown, did you see any Polish guards?

DEFENSE. Object—it is a leading question.

LAW MEMBER. Objection sustained.

Q. On the evening when you testified you were in the little house with Brown did you hear any shots fired?

DEFENSE. Object—a leading question.

LAW MEMBER. Objection sustained.

PROSECUTION. If it please the court I fail to see what is wrong with the question.

LAW MEMBER. It is not the duty of the court to prosecute the case, but, as a suggestion, the prosecution might ask what unusual things or anything took place.

Q. Will you state to the court what time of day or night you were in the house with Brown?

A. In the evening, at eight o'clock.

Q. In the evening, at eight o'clock, were you and Brown the only people in the house?

A. Yes.

Q. Did anybody else ever come into the little house on that evening.

A. No, only a comrade.

Q. What nationality was he, the comrade, if you know?

A. American, too.

Q. Did you hear any unusual noises on that evening?

A. No.

Q. After you left the little house on that evening where did you go?

A. To the police station.

Q. Why did you go to the police station?

A. Because there was a policeman who walked up and he took me along.

52 Q. Why did he take you?

A. Because he heard a shot fired.

Q. What shot?

A. From the pistol.

Q. What pistol?

A. The one Eugene Brown had.

Q. Did Brown have a pistol when you were in the little house with him?

A. I don't know.

Q. Where was this shot that you testified about, where was it fired?

A. From the little house.

Q. Who fired it, if you know?

A. Eugene Brown.

Q. At what did he fire it, if you know?

DEFENSE. Object, unless it is established that she was in a position to see.

LAW MEMBER. Objection not sustained, until the witness indicates she was not in a position to observe it.

A. At one of the "poles".

Q. Where were Poles present?

A. They came in.

Q. Into the house?

A. Yes.

Q. What did they do when they came into the house?

A. They said "Hello".

Q. Then what happened?

A. And then Brown said they should go out.

Q. What did they do?

A. They turned around.

Q. Did they leave the house?

A. No, not immediately.

Q. What did Brown do then?

A. I don't recall.

Q. Was Brown standing up or sitting down?

A. He was standing up.

Q. How long was it before the Poles left the little house?

A. About two minutes—it all happened so quick.

Q. By "Poles" do you mean Polish guards?

A. Yes.

53 Q. How many Polish guards were there?

A. Two.

Q. After they left the little house what did Brown do?

A. I don't recall.

Q. Can you state to the court whether immediately after the Poles left the little house, whether Brown remained in the little house or whether he went outside?

A. He came in, but before the Poles went they said something to Brown and then he was shot.

Q. Who was shot?

A. Brown, he shot him.

Q. Did you see Brown shoot him?

A. No.

Q. Did you hear a shot?

A. Yes.

Q. Where was Brown standing when you heard the shot?

A. At the door.

Q. After you heard the shot what did Brown do?

A. He turned around and came towards me.

Q. What, if anything, did you observe about Brown?

A. He was nervous.

Q. What, if anything, did he have in his hand?

A. His pistol.

Q. What did you do or say at that time?

A. I asked if the Pole was dead.

Q. What did Brown say?

A. I don't recall.

Q. Did you go to any of the windows in that little building at that time?

DEFENSE. Object—it is a leading question.

LAW MEMBER. Objection sustained.

DEFENSE. Request that portion of her testimony pertaining to the shooting be stricken from the record—she evidently didn't see the shooting.

LAW MEMBER. Until the prosecution can produce further evidence from the witness that she actually saw the accused fire the shot and at what he was firing, that part of her testimony will be stricken from the record.

Q. You testified that at the time you heard this shot that Brown was standing in the doorway—is that correct?

A. Yes, and then he turned around.

Q. Was that immediately after you heard the shot or not?

A. Then he came toward me.

54 Q. Did you see either of the Polish soldiers again on that night?

A. Yes, at the MP station.

Q. How many Polish soldiers did you see at the MP station?

A. One.

Q. Where, if you know, was the other Polish soldier?

A. He was dead—I didn't know it at the time.

RGK.

PROSECUTION. Request the answer ~~not~~ be considered by the court as not responsive.

LAW MEMBER. The court will not consider that part of the testimony that the Pole was dead.

Q. After you heard this shot you testified you saw one Polish soldier at the police station—did you see the other Polish soldier after the shot was fired?

A. Yes, at the German station.

Q. Which one did you see?

A. The one who was shot.

Q. What do you know about anyone who was shot?

A. Nothing.

Q. Did you see anyone who was shot?

A. When I looked out the window I saw him.

Q. You did look out the window of this little house then?

A. Yes.

Q. What did you see?

A. The Pole.

Q. Where was the Pole?

A. He was lying on the ground and he was moaning.

Q. After you saw the Pole did you say anything to Brown?

A. Yes.

Q. What did you say?

A. I said I was afraid of him.

Q. Anything else?

A. I asked if he was dead.

Q. How much longer did you stay in the little house after the shot was fired?

A. Maybe about five minutes.

Q. Why did you leave?

A. Because he sent me away.

Q. Who sent you away?

A. Eugene Brown.

55 Q. Why did he send you away, if you know?

A. Because I said I was afraid of him.

Q. What did you do after you left?

A. Then the policeman came afterwards and I went with him to the police station.

Cross Examination.

Q. On the evening in question did you see or did you hear a shot fired—did you see Brown with a gun in his hand?

A. No.

Q. Do you know that he was the one who fired the shot?

A. Yes.

Q. Did you see him fire the shot?

A. No.

Q. Then you don't know he was the one who fired the shot?

A. It was him because afterwards he had a pistol in his hand.

Q. That is the only reason you say he fired the shot?

A. Yes.

Q. Did you see any argument between Brown and these two Polish soldiers before he fired the shot, before they left the house?

A. Yes.

Q. What was that dispute—what did it amount to?

A. I don't know what they said—they only said "Hello" to me and then they said something else after he told them to get out—that is when the Poles said something.

Q. Did the Poles threaten Brown at any time in your presence?

PROSECUTION. Object unless it is established that the witness can understand English or that the accused spoke in German.

DEFENSE. I will rephrase the question.

Q. Did the Poles threaten Brown with any instrument in your presence before the shot was fired?

A. No—one said something but I didn't understand what they said.

Q. Did you see Brown or the two Polish guards after they left the house?

A. No, I didn't look.

Re-direct Examination.

Q. After the soldiers came into this little house where you and Brown were, and said "Good Evening" to you, will you state to the court whether you observed them at all times or whether you were paying particular attention to them or not?

A. What do you mean, if I paid attention to them.

56 Q. If you were paying particular attention to them?

A. No.

Q. After the Polish soldiers said "Good evening" to you, how many times did Brown say anything to the Polish soldiers?

A. I cannot tell for sure.

Q. You did hear him say something to them once, didn't you?

A. Yes, and the Poles said something to him several times.

The court did not desire to examine the witness.

There being no further questions the witness was excused and withdrew from the courtroom.

PRIVATE RICHARD STONE, a witness for the prosecution, was sworn and testified as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. What is your name?

A. Private Stone.

Q. Your full name?

A. Richard E. Stone.

Q. Your organization?

A. The 994th Ord HAM Company.

Q. Do you know the accused in this case?

A. Yes.

Q. If he is present in the courtroom will you indicate him to the court and state his name?

A. Private E. P. Brown. (Indicating.)

PROSECUTION. Let the record disclose that the witness pointed to the accused.

Q. Do you know whether or not his rank is a Private?

A. No, sir, a T/5.

Q. And what Organization is he a member of?

A. The 994th Ordnance HAM Company.

Q. On or about the 25th of December of what organization was he a member.

A. The 994th Ord HAM Co.

Q. On or about 25 December 1946, did the accused Brown come to your attention in any way?

A. Yes.

Q. Will you state to the court the circumstances?

A. I was on post with him?

Q. Where were you on post?

A. At Post 17.

57- Q. Where would that be?

A. Stuttgart—T/5 Brown came to relieve me about ten minutes to eight and I went to my room to retire.

Q. When Brown came to relieve you was he relieving you on guard duty?

A. Yes.

Q. Was he armed?

A. No, sir—I mean I don't believe he was except that he had a carbine.

Q. Then what happened?

A. I went to my room to retire.

Q. Was there anybody in your room when you came in?

A. Yes.

Q. Who came in?

A. Oaks.

Q. What happened then?

A. We heard a shot fired.

Q. How many shots did you hear?

A. One.

Q. What did you do?

A. We went out.

Q. What did you find?

A. T. S. Brown stepped from the guardhouse with a pistol in his hand.

Q. What kind of a pistol?

A. A forty-five—I am not sure.

Q. What else did you see?

A. I saw a Pollock lying in back of the guardhouse.

Q. What type of a Pollock was this man?

A. A soldier I believe—I am not sure.

Q. You say he was lying on the ground?

A. Yes.

Q. What did you observe about him as he was lying there, if anything?

A. He was groaning like he had been hurt in some way.

Q. Was he lying still?

A. No, sir, he was moving around.

Q. Can you describe his movements on the ground?

A. No, I cannot say.

Q. But he was groaning?

A. Yes.

58 Q. What, if anything, did the accused Brown say to you at that time?

A. When he relieved me?

Q. At the time you came back, after you heard the shot—did Brown say anything then?

A. No, sir.

Q. What, if anything, did you do?

A. We picked this wounded man up and carried him into the "polski" guard room where they slept.

Q. Then what, if anything, did you do?

A. There was another Pollock there and they asked him what was wrong and took him to the hospital.

Q. Did you personally take him to the hospital?

A. I drove.

Q. To what hospital?

A. Took him to the civilian hospital and they would not take him so I took him to the 170th.

Q. An Army hospital?

A. Yes.

Q. This was on the 25th of December, 1946?

A. Yes, sir.

Q. When the accused Brown came to relieve you will you state whether or not anybody accompanied him?

A. Yes, sir, a girl.

Q. Do you know who that girl was?

A. I believe it was Elizabeth Rhein.

Q. When Brown came to relieve you was there anybody else in the guard building, other than you, Brown, and the girl?

A. No, sir, I don't believe there was.

Cross Examination.

Q. When you saw Brown after the shooting what did he say?

A. He didn't say anything to me.

Q. Did you hear him say anything to anybody else?

A. No, I didn't.

Q. Where was he?

A. Just walking out of the guard shack.

Q. Standing there?

A. Yes, he had a pistol in his hand.

Q. And didn't say anything?

A. No, he didn't.

Re-direct Examination.

Q. This Polish soldier you saw lying on the ground, can you state his position in relation to the guard shack?

A. He was lying right in back of it.

59 Q. Approximately how far is that from the door of the guardhouse?

A. About six feet.

Examination by the Court.

Q. Were you armed?

A. Yes, sir.

Q. Brown was armed with a carbine on guard duty?

A. Yes, sir.

Q. When you heard the shot fired and went out you saw him standing there with a pistol in his hand?

A. Yes, sir.

Q. Did he have a carbine also?

A. No, sir.

Q. You didn't say anything to him as to how he come to have the pistol?

A. No, sir.

Q. You made no remark to him?

A. No, sir.

Q. You say this was in the rear of the guardhouse?

A. Yes.

Q. Is the door of the guardhouse in the rear?

A. No, sir.

Re-cross Examination.

Q. Did you observe any bullets on the ground at all?

A. No, sir, there was not any in sight.

Q. Did you see a bottle any place in the vicinity of the guardhouse?

A. No, sir.

Re-direct Examination.

Q. Can you state to the court how large this guard shack is you have referred to?

A. It is about six feet long and about four feet wide.

Re-Examination by the COURT.

Q. What questions did you put to the accused when you first arrived at the guard shack and saw him come out?

A. I didn't say anything.

Q. Didn't say a word?

A. No, sir.

Q. Are there any other openings to the guardhouse besides the door?

A. It has three windows—one on each side and one in the rear.

60 There being no further questions the witness was excused and withdrew from the courtroom.

PRIVATE FIRST-CLASS CARL OAKS, a witness for the prosecution, was sworn and testified as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. State your name, rank, organization and station?

A. Private first-class Carl Oaks, 259364994, 994th Ordnance HAM Company.

Q. Will you state to the court where you were on the evening of 25 December 1946.

A. Feuerbach.

Q. Were you in the company of anybody else?

A. Yes, Private Stone.

Q. Do you know Stone's other name?

A. Yes, Richard.

Q. Where were you and Stone on the evening of 25 December 1946?

A. I was in the billets.

Q. Are the billets located in Feuerbach?

A. Yes, sir.

Q. What, if anything, did you observe of an unusual nature on that night?

A. I don't quite get that.

Q. When you and Stone were in the billets on the night of 25 December was there anything unusual that occurred?

A. Yes, sir, we were in the billets when we heard a shot.

Q. As a result of hearing this shot what did you do?

A. We went to the guardhouse.

Q. Then what did you do?

A. I saw this T/5 come from the guardhouse.

Q. By "this T/5," do you mean T/5 Brown?

A. Yes.

Q. If he is in the courtroom will you indicate him to the court by pointing your finger at him?

A. (Witness pointed)

PROSECUTION. Let the record show that the witness pointed to the accused Brown.

Q. Do you know whether or not Brown is in the military service of the United States?

A. I don't know.

61 Q. Is he in the Army?

A. Yes.

Q. What army?

A. United States Army.

Q. On this night did you observe Brown come out of the guardhouse?

A. Yes, sir.

Q. What, if anything, did you observe about him?

A. He had a pistol in his hand.

Q. What kind of a pistol?

A. I looked to me like a forty-five, and when I got up to him I saw it was a forty-five.

Q. Did you see anything else at that time?

A. I saw a Pollock in behind the guardhouse.

Q. What was the Pollock doing there?

A. He was lying on his back and groaning.

Q. Groaning?

A. Yes, sir.

Q. Can you state whether he was lying still or not?

A. He was not lying still—he was moving.

Q. In what manner was he moving?

A. His hands up and down.

Q. Up and down?

A. Yes, up and down in the area across his chest—he was lying on his back.

Q. What, if anything did you do then?

A. I think it was three or four more Pollocks had come to the door there and they had gone back to the billets and he had the pistol in his hands. I saw this and then I went out at that time and he was moving his hands and legs up and down, then they came back to the door and I asked them to help me to take him in and they didn't want to come out.

Q. Was that done?

A. Yes, sir.

Q. What happened to the Pollocks when you had taken him in?

A. He was laying on a cot groaning—he was still groaning and I seen, I found out he had been shot in the right shoulder.

Q. Do you know whether the wound was in the back or in front?

A. I didn't see any blood but I seen the hole where the bullet went through.

Q. Was the hole in the back or front?

A. I forget—in the back.

62 Q. What was done with the Polish soldier then?

A. I went out and started some trucks up—I had considerable trouble starting them.

Q. Did you eventually get one started?

A. I went in and got some of the Pollocks to help and we put him in back and took him to the hospital?

Q. To what hospital?

A. The 387th.

Q. Where is that located—what town?

A. I don't know.

Q. It was the 387th Station Hospital?

A. Yes.

Q. What, if anything, if you know, happened to the Pollock?

A. When I got him to the hospital he was still moving, and he was groaning.

Q. Can you state whether he was moving and groaning as much as when you picked him up?

A. He was not groaning or moving as much.

Q. What, if anything, happened to the Polish soldier?

A. After they took him in?

Q. After you got him to the hospital?

DEFENSE. Object.

LAW MEMBER. Objection sustained.

Cross Examination.

Q. When you came up to the accused, after you heard the shot, what did he say?

A. He mumbled something about the Pollocks.

Q. Didn't you understand what he said?

A. No, sir.

Q. Any of it?

A. No, sir.

Q. Did he speak in Polish?

A. No, sir. I only heard him say something about the Poles.

Q. What happened to the gun that Brown had?

A. That is what I don't know.

Q. Did you take it away from him?

A. No, sir, I didn't.

Q. Did you see a bottle any place around this hut?

A. I don't think so.

63 Q. Who did you think had done the shooting?

A. I don't know, I—

PROSECUTION. Object to that.

LAW MEMBER. Objection sustained.

Examination by the Court.

Q. You knew Brown before the 25th of December?

A. That is right.

Q. When you came out of your billet you saw him at the door of the shack, or outside the shack, with a gun in his hand?

A. Yes.

Q. Did he also have a carbine on his shoulder?

A. I don't know, sir.

Q. He was armed with a carbine?

A. Yes, sir.

Q. Did you say anything to Brown?

A. Yes, I asked him what had happened.

Q. What did he say?

A. He mumbled something about the Pollocks.

Q. That is all the conversation you had with him?

A. Yes.

Q. Where did Brown go then?

A. He went back in the guardhouse.

Q. In the little shack?

A. Yes.

Q. Did you see him later, after you had talked to him?

A. He had come back out of the guardhouse.

Q. Did he still have the pistol?

A. Not in his hands—I don't know where it was.

Q. How soon after you heard the shot did you reach the guardhouse, or vicinity of the guardhouse—can you estimate?

A. Just about four minutes.

Q. Were there other people there when you arrived?

A. I was one of the first.

Q. One of the first?

A. Yes.

Q. But not the first?

A. No.

64 There being no further questions the witness was excused and withdrew from the courtroom.

PROSECUTION. At this time, subject to objection by the defense, the prosecution would like to offer a stipulation in evidence as to the cause of death of Josef Kowalezyk on 26 December 1946.

DEFENSE: The defense agrees to the stipulation.

LAW MEMBER. It will be received in evidence.

PROSECUTION. It is stipulated and agreed to by and between the accused, the defense, and the prosecution that as the result of an autopsy performed upon the body of Josef Kowalezyk on 26 December 1946, by Captain Robert J. Brimi, Medical Corps, 387th Station Hospital, U. S. Army, Pathologist, it was determined that the cause of death was internal massive hemorrhage from a gunshot wound of the right chest and abdomen.

Does the defense so stipulate to that?

DEFENSE. It does.

PROSECUTION. The prosecution rests.

The court then took a recess until 2:20 o'clock p. m., at which hour the personnel of the court, prosecution and defense, and the accused, interpreter and the reporter resumed their seats.

PROSECUTION. Does the defense desire any witnesses called.

DEFENSE. The rights of the accused have been explained to him and he desires to take the stand as a witness in his own behalf.

PROSECUTION. Will the law member explain the rights of the accused as a witness.

The law member explained the right of the accused as a witness, as follows:

Technician Fifth Grade Brown, as the accused in this case you have the right to do one of three things:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be con-

sidered and weighed as evidence by the court just like the testimony of other witnesses, and you can be cross-examined on your testimony by the trial judge advocate and the court.

Second, if you do not want to testify under oath you may, without being sworn, say anything you desire to the court as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here.

65 This statement can be oral or written and can be either by yourself, by your counsel, or by both of you. Since such a statement is not given under oath, and since you cannot be cross-examined upon it, it cannot be given the same weight by the court as sworn testimony, but it will be considered by the court and given such weight as it may seem to deserve. However, any admission or confession which you may make in your unsworn statement can be considered by the court as evidence against you. Furthermore, even though you may be sworn as a witness you may also, if you wish, afterwards make a statement of this kind, not under oath.

Third, you may remain silent, that is, say nothing at all. You have a perfect right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself, or make any statement, will not count against you in any way with the court. It will not be considered as any admission that you are guilty, nor can it be commented on in any way by the trial judge advocate in addressing the court.

Knowing these various rights, take time to consult with your counsel and then state to the court which you will do.

ACCUSED. I desire to take the stand and make a sworn statement.

TECHNICIAN FIFTH GRADE EUGENE P. BROWN, the accused, was sworn and testified in his own behalf as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. State your name, rank, and organization.

A. Eugene P. Brown, Technician Fifth Grade, 994th Ordnance HAM Company.

Q. Are you the accused in this case?

A. Yes.

Questions by the DEFENSE.

Q. What were your instructions regarding the Polish guards with regards to their staying around guard posts?

A. To keep them away from the guard posts.

Q. When these two Polish guards came to your guard post what did you intend to do?

A. I intended to let them get warm.

Q. Let them get warm?

A. Yes.

Q. And then what?

A. Make them leave.

66 Q. When you approached them to leave what was their reaction?

A. They didn't seem to want to go.

Q. Did you insist on their going?

A. Yes.

Q. Then you got outside the guardhouse tell the court what happened?

A. I didn't go outside the guardhouse—they finally walked out the door and stopped.

Q. Stopped at the door?

A. Yes.

Q. What did you do then?

A. I picked up the pistol that was behind the coal box in the guardhouse.

Q. Then what did you do?

A. I walked to the door.

Q. What did the Polish guards do then?

A. One of them swung a bottle at me three times.

Q. Did he hit you?

A. No, sir.

Q. Did he threaten you in any way, other than swinging at you?

A. No, sir.

Q. Did he threaten to strike you in any other way?

A. One of them did in the guardhouse.

Q. What did you do?

A. I was building a fire and I told them to go on-out. I couldn't understand them and one of them struck his fist at me on the lip.

Q. And that is when you insisted upon their going out?

A. Yes.

Q. What did you do with this bottle?

A. Sat it at the door, on the right hand side.

Q. Why did you fire at the Poles?

A. Self-defense.

Q. You anticipated what?

A. I thought they were going to hit me on the head with the bottle.

Cross Examination.

Q. On the 25th of December, Christmas night, it was pretty cold, wasn't it?

A. Yes, sir.

67 Q. And these Poles came into your guardhouse to get warm—is that correct?

A. That is what I thought.

Q. Did you have a fire in the guardhouse?

A. The fire was about out and I was building it up.

Q. But it was warm inside?

A. Yes.

Q. And you were going to let them stay in there to get warm?

A. They only had forty feet to go to get into their own guard room.

Q. What kind of arms were they carrying?

A. I don't know.

Q. They didn't have a carbine with them, did they?

A. No.

Q. Or a forty-five pistol?

A. Not that I could see.

Q. If they had had you could have seen it, could you not?

A. There is no light in the guardhouse.

Q. Was it totally dark?

A. It was dark outside, but a little light showed in the window.

Q. The light shining in the window—what was that from?

A. On a telephone pole.

Q. Will you tell the court what the size is of this guardhouse?

A. About like a GCM truck—about twelve feet long and six feet wide.

Q. Twelve-by six?

A. Yes.

Q. You had a girl in the guardhouse with you at the time?

A. Yes, at the time I went on duty.

Q. About eight o'clock?

A. Yes.

Q. Is that girl you had in there the same girl who testified in here today?

A. She is.

Q. You said you picked up a pistol from behind the coal bin—is there a coal bin in there?

A. There is a wooden box about that long (indicating).

PROSECUTION. May the record disclose the dimensions of the box to be approximately 3½ ft. x 18" x 18".

68 Q. That is in the guard room?

A. Yes.

Q. What kind of a stove do you have in there?

A. It is a five gallon oil can, round, and made into a stove.

Q. What else is in there besides the stove?

A. Two chairs.

Q. What kind?

A. Regular kitchen chairs.

Q. Straight back chairs?

A. Yes.

Q. Anything else?

A. A shelf next to the door and the telephone.

Q. Is there a desk in there?

A. A shelf—we use that for a desk.

Q. There is no light?

A. No, sir.

Q. You and this girl were in there—is that correct?

A. Yes.

Q. And then this Josef Kowalczyk and the other Polish guard came in?

A. Yes.

Q. How long were they in this guardhouse?

A. I couldn't say for sure—they were in there for a few minutes.

Q. Would you say as many as three minutes?

A. Yes, I would say that.

Q. Three minutes?

A. Yes.

Q. And when they came in they said "Good Evening" to this girl?

A. I don't know—I don't understand German.

Q. No German?

A. Only a few words.

Q. After they came in they made some remark to somebody—you did hear them say something?

A. They was saying something or other to me—that was after I told them they would have to leave.

Q. How long had they been in there before you told them to leave?

A. A few minutes.

69 Q. Two minutes?

A. Longer than that.

Q. You testified they were in there three minutes—how long did they remain after you told them to leave?

A. Probably a half a minute.

Q. After you told them they would have to leave, what were they doing?

A. They were arguing.

Q. Did you understand what they said to you?

A. No.

Q. How do you know whether they were arguing?

A. They were talking in a loud voice.

Q. You testified you were going to let them get warm?

A. Yes.

Q. Did you figure that at the end of the two minutes they were warm?

A. They started messing around.

Q. What do you mean?

A. They grabbed the girl and started saying something or other to her.

Q. Do you have any idea of what was said to the girl?

A. No, sir.

Q. Could they have been asking her some questions?

A. I don't know.

Q. After they, after one of them placed his hand on her shoulder, what did you do?

A. I told them that is not what they came in for and if they had come in to start something they would have to go.

Q. In English or German?

A. In English.

Q. Did you say anything to them in German which they didn't seem to understand?

A. I said "Raus".

Q. Did you ask them if they knew what that meant?

A. Yes.

Q. Did you ask them that in German or English?

A. English.

Q. Did they understand?

A. They said "Yes".

Q. Was this before or after you pointed the pistol at them?

A. I didn't point the pistol at them until they were outside—the only time was when I shot him.

70 Q. When you told them to "raus", is that when this one boy struck you in the mouth?

A. No.

Q. When did he strike you in the mouth?

A. That was the first time.

Q. You had told him to get out before?

A. Yes.

Q. Before he struck you in the mouth?

A. Yes.

Q. What happened then?

A. I told them to get out and they stood there and looked at me.

Q. You testified a while ago that after you told them to get out of there they were there for about thirty seconds longer?

A. Yes.

Q. Is that after you had been struck in the mouth?

A. Yes.

Q. And at the end of thirty seconds time you said they walked out of the door—is that right?

A. In a few seconds—I don't know whether it was thirty seconds or longer.

Q. There was a relatively short lapse of time?

A. It wasn't very long.

Q. You didn't have a pistol at this time?

A. No, sir.

Q. After the second time that you told them to get out of there, after this short period of time, this thirty seconds, they walked out of the door—is that correct?

A. That is.

Q. One of them only struck you once?

A. That is right.

Q. Not very hard?

A. No, sir.

Q. At the end of thirty seconds they walked out and you walked over behind the coal bin and picked up the pistol?

A. After they stopped at the door and didn't go on.

Q. Were they inside or outside?

A. Just outside.

Q. Then you went over to the coal bin and got the pistol?

A. Yes.

74 Q. A forty-five?

A. Yes.

Q. Then you walked from the coal bin to the door with the pistol in your hand—is that correct?

A. Yes.

Q. When you got to the door how far outside the door were the Polish guards?

A. One of them, on the left, was about two or three feet away.

Q. Where was the other?

A. On the right, about four or five feet, or something like that.

Q. How far outside the door were they?

A. One was on the left side of the door, about two or three feet away and one was on the right side, about four or five feet away.

Q. One on one side and one on the other side of the door—how far away from the building, two, five, or fifteen feet?

A. The one on the left, he might have been a foot or eighteen inches away from the building.

Q. How far away was the one on the right?

A. A little further.

Q. At that time what happened?

A. When I walked up to the door this here one on the left swung a bottle at me.

Q. What kind of a bottle?

A. I couldn't say.

Q. Did it have anything in it?

A. It dropped to the ground and when I picked it up it didn't have anything in it.

Q. Empty?

A. Yes.

Q. What color was it?

A. I couldn't say—I think it was a dark bottle.

Q. A dark, glass, empty bottle?

A. Yes.

Q. Where did he get it?

A. I don't know.

Q. You hadn't seen it before?

A. No.

72 Q. Was it in the guardhouse?

A. I couldn't say.

Q. You will not say it wasn't?

A. I don't know.

Q. Did he have the bottle when he walked outside the door?

A. I didn't see it.

Q. How long did he stand outside the door before your appearance at the door with the forty-five?

A. A minute or more.

Q. In regards to this bottle—will you state in what direction of your anatomy it was swung at?

A. Head or face.

Q. How far did he miss you?

A. He missed—I tipped my head back—it wasn't very far.

Q. As far as a foot?

A. I couldn't say for sure.

Q. How many times did he swing this at you?

A. Three times.

Q. And all this time you did nothing?

A. I was loading my gun.

Q. You were loading your gun to shoot, weren't you?

A. Trying to keep him from hitting me.

Q. Is there a door in that guardhouse?

A. Part of a door, cut off from a half ton truck.

Q. The bottom or upper half of a door?

A. The bottom half.

Q. Brown, if you had closed the door and stepped back in the guardhouse could he have hit you?

A. He would have come on.

Q. He would have had to open the door, would he not?

A. Yes.

Q. After he swung at you the third time with the bottle what did you do?

A. I pulled my gun back and put a shell in the chamber.

Q. Then what?

A. As he swung around again I shot.

Q. Did you shoot him simultaneously at the time he swung at you?

A. He swung and the swing sort of turned him around and I pulled the trigger.

Q. In other words, he swung the bottle, turned around, and you shot?

A. Yes.

73 Q. Was his shoulder facing directly towards you?

A. Something like that—his shoulder or side.

Q. Shoulder, side, or something like that?

A. Yes.

Q. That is when you fired the pistol?

A. Yes.

Q. You were shooting at him?

A. Yes.

Q. You intended to hit him?

A. Tried to frighten him.

Q. Were you shooting at his feet?

A. I could tell—I wasn't taking aim.

Q. You didn't take aim?

A. Yes.

- Q. As a result of that you shot him in the back?
- A. I don't know where I hit him.
- Q. You did intend to shoot him?
- A. Trying to keep him away.
- Q. Did it ever occur to you to stop when he was leaving?
- A. I didn't have much time.
- Q. Where is the coal bin located in this guardhouse?
- A. In the back.
- Q. You went from the back, where the coal bin is—a distance of twelve feet, to get yourself into range?
- A. I went out to see what they were doing—I walked to the door and looked out.
- Q. You opened the door and looked out?
- A. I didn't open it—I looked over the top of the door.
- Q. And they were standing outside?
- A. The door was closed.
- Q. A while ago you testified the door was open?
- A. I didn't testify the door was open.
- Q. Was the door closed when you shot this man?
- A. I wouldn't say whether it was correct, or whether I had gone on the outside of the door.
- Q. Do you have any orders as a guard to the extent you will use a forty-five in order to evict Polish guards from the guard posts?
- A. No, sir.
- Q. What did you do after you shot this man?
- A. I went back—I went outside and called Private Oaks.
- 74 Q. What did you say to Oaks?
- A. When he came to the door I told him to bring me a flashlight.
- Q. Did you tell him anything about shooting this Polish guard?
- A. No, sir.
- Q. Did you still have the gun in your hand?
- A. Yes.
- Q. Why did you have the gun in your hand?
- A. I was going in to put it back.
- Q. What did you do with this girl?
- A. I must have been on the outside for when I went back I told her to leave.
- Q. Why did you tell her to leave?
- A. She didn't have any business there.
- Q. You brought her there, didn't you?
- A. Yes, she brought me some sandwiches down.

Q. This was in Feuerbach, Germany?

A. Yes.

Q. On the 25th of December, 1946?

A. Yes.

The court did not desire to examine the witness.

There being no further questions the witness was excused and resumed his seat as the accused.

DEFENSE. The defense rests.

PROSECUTION. The prosecution would like to recall Franz Olschewski.

FRANZ OLSCHESKI, a polish soldier, a previous witness for the prosecution, was recalled by the prosecution, and upon being advised that his oath previously taken was still binding, testified, through the interpreter, as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. When you were present on the 25th of December 1946 in the guardhouse with guard Brown, did either you or Kowalczyk engage in any sort of violence inside the guardhouse with Brown?

A. No.

Q. Was anybody inside that guardhouse struck by anybody?

A. No, I don't know that.

75 Q. Did either you or your friend have a bottle of any description?

A. No.

Q. Was anybody present from the time you arrived at the guardhouse and the time you left who was struck at with a bottle or other instrument?

A. When I was there, No.

Q. When you were standing immediately outside the door, after the accused Brown had told you to leave, did you and Kowalczyk remain outside the door or did you leave immediately?

A. I was—that is to say Kowalczyk was turning around to go and I said “boy, it is OK what you do”.

Q. What, if anything did Kowalczyk do at that time?

A. He was turning around there with his back, not the whole back, but half towards the door and went to walk away and turned around, took a few steps, and that is when the shot was fired.

Q. When the shot was fired did Kowalczyk have anything in his hands?

A. No.

Q. Were either you or Kowalezyk armed?

A. No, I had a sweater on only.

Q. But did either you or Kowalezyk have a gun of any description?

A. No.

Q. Did you or Kowalezyk take a bottle into the guardhouse?

A. No.

Q. At any time, when you were present at the guardhouse on that night, did you see a bottle?

A. I didn't see any bottle there.

The defense did not desire to cross-examine the witness.

Examination by the Court.

Q. What were you doing in the American guardhouse?

A. Before that I was speaking to a soldier who was on guard there and then I was walking away and came back and thought he was still there and I called to talk to him.

Q. How much time had elapsed when you came back?

A. I cannot state—I didn't have a watch—I cannot tell—maybe about ten minutes.

76 Q. Is it a fact that Polish orders, written by Polish officers, forbid men to come to the American guardhouse?

A. No—I was at this guardhouse before, standing there talking to him and he said I should come back and come in and we were talking and I thought he was still there and that is why I went in when I came back.

Q. What languages do you speak?

A. Polish, German, and a little bit of English.

Q. You were talking with a soldier ten minutes before—were you speaking in English.

A. He was singing Polish—he could sing a little bit in Polish.

Q. You were singing, not talking?

A. The soldier was singing and then I told him he was not so very good.

There being no further questions the witness was excused and withdrew from the courtroom.

PROSECUTION. The prosecution has nothing further.

DEFENSE. We desire that Private Stone be recalled to verify the fact that this Polish man was with Stone.

PROSECUTION. Does the defense wish to recall the witness Stone as a rebuttal witness for the defense?

DEFENSE. Yes.

PRIVATE RICHARD E. STONE, a previous witness for the prosecution, was recalled as a rebuttal witness for the defense and upon being advised that his oath previously taken was still binding, testified as follows:

Direct Examination.

Questions by the DEFENSE.

Q. Just before you went off duty that night at the guardhouse were you talking to this Polish soldier?

A. No, sir, not that night.

Q. Had you seen him before?

A. Yes, that afternoon.

Q. How long before?

A. That was before I went on duty when I seen him.

Q. Were you at the guardhouse?

A. Well, sir, right in front of it.

Q. How, in the doorway?

A. No, in front.

77 Q. How long was your tour of duty?

A. Two on and four off.

Q. In other words you were talking to him two hours before you went on duty?

A. It was before I went on duty.

Q. Did you speak in Polish?

A. No, sir.

Q. In what language were you talking to him?

A. I can speak a few words.

Q. But it was before that two hour period that you were on duty?

A. Yes.

Q. You didn't talk to him just prior to coming on duty?

A. No.

The prosecution did not desire to cross-examine the witness.

Examination by the Court.

Q. The accused, Corporal Brown, relieved you?

A. Yes.

Q. What time was that?

A. Ten minutes to eight.

Q. You say you were talking to this Pole, or were you trying to sing Polish.

A. I know a Polish song.

Q. In other words you were trying to sing in Polish?

A. I guess it is that.

Q. But you were singing?

A. Yes.

Q. What did the Polish soldier say to you after you finished?

A. He just laughed.

Q. Did he say anything?

A. Not that I recall.

There being no further questions the witness was excused and withdrew from the courtroom.

PROSECUTION. In order to clarify a point I would like to have the reporter read back a portion of the Polish soldier's testimony. There is testimony that an American soldier was singing a Polish song ten minutes earlier. The defense has asked several questions as to whether that Polish soldier was there ten minutes before or some time prior to that. I believe if we can recall Private Stone we can clarify this situation.

78 PRESIDENT. The record discloses that was testified to.

PROSECUTION. It is not known what is in the minds of the court. For the sake of the record and in order to clarify a point in my own mind it is desired to recall this witness.

PRESIDENT. If there is no objection to his recall simply for rebuttal, Private Stone may be recalled.

PRIVATE RICHARD E. STONE, a previous witness for the prosecution, and a witness in rebuttal for the defense, was recalled by the prosecution and upon being advised that his oath previously taken was still binding, testified as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. A short while ago you testified that the Polish soldier you had seen was prior to going on guard duty, and that that was two hours earlier?

A. Yes, sir.

Q. Drawing your attention to the Polish soldier whom you have seen in the hall here, will you state to the court how long it was you saw him before you went off guard?

A. He was in the guardhouse about fifteen or twenty minutes before I was relieved.

Q. Is he the Polish soldier who was listening to you sing Polish songs?

A. Yes.

Cross Examination.

Q. You testified you talked to a Polish soldier two hours before you went on duty and now you testify it was a short while before you went off duty?

A. Yes.

Q. What made you change your mind?

A. I thought you were talking about the Polish soldier who was shot.

Q. Was anything said to you about changing your story?

A. I don't believe there was.

Q. What refreshed your memory?

A. I just got to thinking about it, that's all.

Q. Did someone tell you, remind you, you had seen him at a different time?

A. This Polish soldier was asking me about the Polish song.

79 Q. Did he tell you in English, Polish, or German?

A. He said sing about "Madalon."

Q. And you knew from that I had been asking him about singing that song?

A. Yes, sir.

Examination by the Court.

Q. That was fifteen minutes prior to your being relieved from guard?

A. Yes, sir.

Q. In your previous testimony, did I understand you to state that the accused, Brown, relieved you on guard duty?

A. Yes.

Q. He relieved you?

A. Yes, sir.

Q. Who made the relief?

A. What do you mean?

Q. I mean by that, the non-commissioned officer coming up and posting you, or do you automatically relieve each other?

A. We automatically relieve each other.

Q. And he did come up and relieve you?

A. Yes.

Q. What was he armed with?

A. A carbine is all I saw.

Q. But he did have a carbine?

A. Yes, sir.

Q. You are positive of that?

A. No, sir, he didn't.

Q. He didn't have a carbine?

A. No, sir.

Q. Was he duly posted as a guard?

A. Yes, he relieved me.

PROSECUTION. If it please the court, these are not proper rebuttal questions.

PRESIDENT. The court has no further questions of this witness.

There being nothing further the witness was excused and withdrew from the courtroom.

80 PRESIDENT. A member of the court desires that somebody from that organization be brought here to testify as to whether or not this man was on guard—was posted on guard.

PROSECUTION. Does the court desire to continue this case until such time as a witness can be produced?

PRESIDENT. If that is necessary, yes. The case will be continued until such time as we can procure that testimony.

PROSECUTION. Does the court desire to set a date for the continuance of the trial?

PRESIDENT. Just as quickly as possible—as soon as the prosecution can obtain the witness.

PROSECUTION. We cannot continue with this trial any time prior to the 14th of this month.

PRESIDENT. A continuance is granted until 10:00 o'clock a. m., Tuesday, 14 January 1947.

PROSECUTION. For the purposes of the record, may I ask which member desires the witness called.

PRESIDENT. The president does—testimony has been presented that the accused was on guard duty at the time of the incident.

The court then, at 3:20 o'clock P. M., on 9 January 1947, adjourned until 10:00 o'clock a. m., the 14th instant.

RICHARD G. KANE
Richard G. Kane
Captain MAC
Trial Judge Advocate

81 Mannheim, Germany
14 January 1947

The court met, pursuant to adjournment, at 10:40 o'clock a. m., all the personnel of the court, prosecution, and defense, who were present at the close of the previous session in this case, being present, except:

LT COL BYRON D. GREENE	0-900785	TC	11th Traffic Reg Grp (Transferred)
MAJOR WILLIAM D. VAN ARNAM	0-189138	QMC	558th QM Grp (Transferred)
CAPT RALPH L. WHITMORE	0-422201	MAC	62nd Field Hospital (Transferred)
CAPT HARRY I. FERNANDES	0-389982	INF	4004th TC Trk Co., Asst. Defense Counsel (Transferred)

The accused, reporter, and interpreter were also present.

PROSECUTION. Witnesses requested by the court at the last session of this court are now available and will be called at this time.

PRIVATE RICHARD E. STONE, a previous witness for the prosecution, and a rebuttal witness for the defense, was recalled as a witness for the court and upon being advised that his oath previously taken was still binding, testified as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. On or about the 25th of December 1946, at the 994th Ordnance Company will you state to the court whether or not you were on guard duty?

A. Yes, sir.

Q. What hour did you go and what hour were you relieved?

A. I went to guard duty at six o'clock.

Q. 1800 hours?

A. 1800 hours.

Q. What time were you relieved?

A. 2000 hours.

Q. Who relieved you?

A. I was relieved by T-5 Brown.

Q. And by T/5 Brown do you refer to the accused in this case?

A. Yes.

PROSECUTION (To defense). Your witness.

DEFENSE. I want to question the witness—I have no question about the relieving of the guard, but I want to ask one other question.

LAW MEMBER. It is the opinion of the law member that you can recall him as a witness.

82 PRIVATE J. WESOLEWSKI, a witness called for the court, was sworn and testified as follows:

Direct Examination.

Questions by the PROSECUTION.

Q. State your name, rank, organization and station.

A. Private J. Wesolewski, 994th Ordnance HAM Co.

Q. Where is that located?

A. Esslingen, Germany.

Q. On or about the 25th of December, will you state whether or not you were on guard duty?

A. Yes, I relieved T/5 Brown.

Q. When you refer to T/5 Brown, you mean the accused?

A. Yes, sir.

Q. At what hour did you relieve him?

A. Between eight-thirty and nine.

Q. What was the reason for relieving him?

A. The sergeant came and told me to relieve him, as the MP—

Q. When you say eight-thirty or quarter to nine, do you refer to 2045 hours?

A. Yes, sir.

PROSECUTION (To defense). Does the defense desire to question the witness?

DEFENSE. The defense does not.

PROSECUTION. Does the court desire to question the witness?

PRESIDENT. The court does not.

There being no further questions the witness was excused and withdrew from the courtroom.

PROSECUTION. The prosecution offers in evidence, as Prosecution Exhibit No. 1, Guard Book of the 994th Ordnance HAM Company, covering the dates 25th and 26th of December 1946, subject to objections by the defense.

DEFENSE. The defense has no objection.

LAW MEMBER. It will be received in evidence.

PROSECUTION. Request permission to withdraw the original at the conclusion of the trial and substitute therefor a true extract copy of the dates in question.

LAW MEMBER. You may do so.

83 Guard Book of the 994th Ordnance HAM Company, together with extract true copy covering the dates 25th to 26th December 1946, were received in evidence for the prosecution and extract true copy was marked "Prosecution Exhibit No. 1."

DEFENSE. I would like to recall the last two witnesses to establish one point.

PRESIDENT. The defense may recall the witnesses.

PRIVATE RICHARD E. STONE, a previous witness for the prosecution, defense, and the court, was recalled by the defense, and upon being advised that his oath previously taken was still binding, testified as follows:

— Direct Examination.

Questions by the DEFENSE.

Q. Stone, when you were relieved, was there a bottle in the guardhouse?

A. I didn't see it.

Q. Would you have seen it if there had been one by the door?

A. Yes.

Q. You didn't see any there?

A. No, sir.

Neither the prosecution or the court desired to examine the witness.

There being no further questions the witness was excused and withdrew from the courtroom.

PRIVATE J. WESOLEWSKI, a previous witness for the court was recalled by the defense and upon being advised that his oath previously taken was still binding, testified as follows:

Direct Examination.

Questions by the DEFENSE.

Q. At the time you relieved T/5 Brown, did you see a bottle at the guardhouse or at any place standing right by the door?

A. Yes, sir.

Q. Will you describe the bottle?

A. It was about a three quarter or a quart bottle.

Q. Was it thin or long?

A. A bottle so big (indicating).

DEFENSE. For the record—about 12" long and about 3" in diameter, a $\frac{3}{4}$ bottle.

Q. Was that bottle inside of the shack?

A. Yes, sir.

84 Q. The door was closed or open?

A. Closed.

DEFENSE. No further questions.

Neither the prosecution or the court desired to examine the witness.

There being no further questions the witness was excused and withdrew from the courtroom.

DEFENSE. I would like to recall T/5 Brown, the accused.

PRESIDENT. I will again read your constitutional rights.

DEFENSE. They have already been explained.

PRESIDENT. T/5 Brown, I will read to you your constitutional rights.

The President advised the accused of his rights as follows:

T/5 Brown, as the accused in this case you have the right to do one of three things:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just like the testimony

of other witnesses, and you can be cross-examined on your testimony by the trial judge advocate and the court.

Second, if you do not want to testify under oath you may, without being sworn, say anything you desire to the court as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here. This statement can be oral or written, and can be made either by yourself, or your counsel, or by both of you. Since such a statement is not given under oath, and since you cannot be cross-examined upon it, it cannot be given the same weight by the court as sworn testimony, but it will be considered by the court and given such weight as it may seem to deserve. However, any admission or confession which you may make in your unsworn statement can be considered by the court as evidence against you. Furthermore, even though you may be sworn as a witness you may also, if you wish, afterwards make a statement of this kind, not under oath.

Third, you may remain silent, that is, say nothing at all. You have a perfect right to do this if you wish and if you do so the fact that you do not take the witness stand yourself, or make any statement, will not count against you in any way with the court. It will not be considered as any admission that you are guilty, nor can it be commented on in any way by the trial judge advocate in addressing the court.

85 These rights were explained to you when you were arraigned on the 9th of January, but inasmuch as you indicated your desire to make additional testimony, I have again read to you your rights.

Knowing these various rights, take time to consult with counsel and state to the court what you wish to do.

DEFENSE: The accused wishes to take the stand and make a sworn statement.

TECHNICIAN FIFTH GRADE EUGENE BROWN, the accused, was, at his own request, recalled to the stand and upon being advised that his oath previously taken was still binding, testified as follows:

Direct Examination.

Questions by the DEFENSE.

Q. Brown, when you took this bottle from the Polish guard, what did you do with it?

A. I placed it on the right hand side of the door.

Q. Inside or outside?

A. Inside.

Examination by the Court.

Q. When did you take this bottle away from him?

A. He dropped it when I shot him.

Q. You did not take it away from him?

A. No, sir, I picked it up off the ground.

Q. After you shot?

A. He dropped it when I shot him.

Q. And you went out and picked it up, brought it back and set it there, down inside of the door?

A. Yes.

Q. The Pole did not drop at the time he dropped the bottle?

A. No, sir, he didn't fall.

Q. Which one of the Polish guards had the liquor?

A. I don't think there was anything in the bottle, but the one I shot—

Q. The one you shot had the bottle?

A. Yes, sir.

The prosecution did not desire to cross-examine the witness.

There being no further questions the witness was excused and resumed his seat as the accused.

DEFENSE. The defense rests.

The defense and prosecution made oral arguments in closing.

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FINDING OF COURT

FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

Of the Specification and Charge—Guilty.

PREVIOUS CONVICTIONS, ETC.

The court was opened and the trial judge advocate stated, in the presence of the accused and his counsel, that he had no evidence of previous convictions, ~~which was read to~~

(No or some)

(Cross out if inappropriate)

~~the court and is attached as Exhibit~~

The trial judge advocate read the data as to age, pay, service, and data as to restraint of accused as shown on the charge as follows:

Age 39 Pay, \$112.50 per month. Allotments to dependents, \$27.00 per month.

(Base pay plus pay for length of service)

Government insurance deduction, \$ none per month.

Data as to service: 10 December 1940 to September 3, 1941, ERC 3 December 1941 to 16 January 1942 AUS 16 January 1942 to 6 September 1945. Enl 17 November 1945 to serve three (3) years.

Data as to restraint of accused: Confined Provost Marshal's Office, Stuttgart, Germany, 3rd Army Stockade 28 December 1946.

Prosecution to accused: Is that data correct?

Accused: Yes.

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SENTENCE

The court was closed, and upon secret written ballot three-fourths of the members present at the time the vote was taken concurring, sentences the accused to "be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life."

The court was opened and the president announced the findings and sentence.

The court then, at 11:40 o'clock, A. M., January 14, 1947 adjourned to meet at the further call of the president.

Authentication of Record

JAMES E. BUSH

James E. Bush

Colonel FA

President

RICHARD G. KANE

Richard G. Kane

Captain MAC

Trial Judge Advocate

I examined the record before it was authenticated.

LAWRENCE RUSSELL

Lawrence Russell

Major INF

Defense Counsel

Approval of Sentence

HEADQUARTERS
CONTINENTAL BASE SECTION
U. S. FORCES, EUROPEAN THEATER

APO 807
3 March 47

In the foregoing case of Technician Fifth Grade Eugene P. Brown, RA 34 001 224, 994th Ordnance HAM Company, the sentence is approved. The United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, is designated as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$ the order directing the execution of the sentence is withheld.

T. F. BRESNAHAN
T. F. Bresnahan
Brigadier General, U. S. Army
Commanding

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1949.

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Cases:

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<i>Humphrey v. Smith</i> , 336 U. S. 695	13
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<i>Quirin, Ex parte</i> , 317 U. S. 1	13
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AW 46 (10 U.S.C. 1517)	3
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Miscellaneous:

Manual for Courts-Martial (1949), Sec. 4(e), p. 3	11
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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern Division of Georgia sustaining a petition for a writ of habeas corpus and directing the discharge of respondent from custody.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 135-140) is reported at 175 F. 2d 273. The opinion of the District Court (R. 104-109) is reported at 81 F. Supp. 647.

JURISDICTION

The judgment of the Court of Appeals was entered June 16, 1949 (R. 140). On September 13, 1949, by order of Mr. Justice Black, the time

within which to file a petition for a writ of certiorari was extended to and including September 30, 1949 (R. 142). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination by the military authority appointing a general court-martial, in detailing as law member thereof an officer not in the Judge Advocate General's Department, that an officer of that Department was "not available for the purpose" within Article of War 8, is subject to collateral attack on habeas corpus.

2. Whether allegedly prejudicial errors and irregularities in a court-martial proceeding are judicially reviewable on collateral attack, where such errors do not relate to the jurisdiction of the court-martial.

STATUTE INVOLVED

The second paragraph of the 8th Article of War (10 U.S.C. (1946 ed.) 1479), provided at all times relevant hereto as follows:

The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member,

shall perform such other duties as the President may by regulations prescribe.

STATEMENT

On January 9 and 14, 1947, respondent, then serving as a soldier with the rank of Technician, Fifth Grade, in the Occupation Forces of the United States Army, was tried and convicted of murder, in violation of the 92d Article of War (10 U.S.C. 1564), by a general court-martial held at Mannheim, Germany (R. Vol. II, 53). He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to confinement at hard labor for life (R. Vol. II, 96-97). After review of the record of trial by the Staff Judge Advocate (R. Vol. II, 15-20; see also AW 46, 10 U.S.C. 1517), the appointing authority approved the sentence and forwarded it for confirmation (R. Vol. II, 98). Thereafter, pursuant to AW 50¹/₂, 10 U.S.C. 1522, the record was examined by a Board of Review in the Office of the Judge Advocate General. The Board rendered an opinion, holding that the record of trial was legally sufficient to support the sentence (R. Vol. II, 5-6). The Judge Advocate General approved the holding of the Board of Review, but in view of the circumstances of the case recommended that the period of confinement be reduced to twenty years (R. Vol. II, 6-7). On May 16, 1947, General Orders No. 190, Headquarters, Continental Base Section, European Command, were published, reducing the sentence to twenty years' imprisonment and desig-

nating the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct, as the place of confinement (R. Vol. II, 7-8). Respondent was committed to the United States Penitentiary, Atlanta, Georgia, on September 24, 1947 (R. 31).

On July 16, 1948, respondent filed in the District Court for the Northern District of Georgia a petition for a writ of habeas corpus alleging, as thrice amended (R. 1-16, 38-40, 46-48, 50), that the court-martial was not legally constituted under the provisions of AW 8 (*supra*, pp. 2-3) and was therefore without jurisdiction because the Law Member was not an officer of the Judge Advocate General's Department, although an officer of that department "was available for the purpose" (R. 39-40); that the sentence of the court was invalid because it was based upon a finding of guilty by only two-thirds instead of three-fourths of the members of the court (R. 13-14); that the pre-trial investigation was not thorough and did not comply with the requirements of AW 70 (10 U.S.C. 1542) in other respects (R. 5-11, 38-39, 47-48); and that he was not afforded the effective assistance of counsel at his trial (R. 12, 50).

The writ issued (R. 67) and a hearing was held at which respondent was the only witness (R. 79-103). Thereafter, on review of the testimony and the record of respondent's trial (Vol. II of the record here), the District Court on November 17, 1948, entered an opinion and order sustaining the

writ and directing that petitioner discharge respondent from custody (R. 104-109). The decision was based solely upon the order of the Commanding General of December 7, 1946, establishing a general court-martial "for the trial of such persons as may be properly brought before it."¹ Of the 19 officers appointed to the detail for the court, one—Captain Jack H. Chalkley—was a member of the Judge Advocate General's Department. He and a Captain of the Adjutant General's Department were designated as Assistant Trial Judge Advocates, the Trial Judge Advocate being a Captain of the Medical Administrative Corps. A Major, a Captain and a 1st Lieutenant of Infantry were designated as Defense Counsel and Assistant Defense Counsel, respectively. A Colonel of Field Artillery was appointed Law Member and the other members of the court were officers from other branches of the services. (R. Vol. II, 53-54.). The record of trial also showed, however, that Captain Chalkley, as well as the two Assistant Defense Counsel and four members of the court, were absent when respondent's case was tried on January 9 and 14, 1947. Specifically, it showed that Captain Chalkley and one of the members of the court were absent "VOCG" (verbal orders of the commanding general). (R. Vol. II, 54-55, 91, 97).² The District Court held

¹ The offense for which respondent was tried by this court-martial was committed on December 25, 1946 (R. Vol. II, 56).

² At the opening of the trial "The accused stated he desired to be defended by the regularly appointed defense counsel" (R. Vol. II, 55).

that AW 8 required that the law member of a court-martial be a member of the Judge Advocate General's Department, "except in the single instance where such officer was not available," and that where an officer of that department was "available," "No discretion whatever was given the appointing authority." Accordingly, since the record showed the appointment of a member of that department—Captain Chalkley—to the detail for the court-martial and there was no showing on the record or by extrinsic evidence as to why he was not appointed Law Member, the court concluded that he was "available" for that purpose, that the failure to appoint him Law Member constituted a violation of AW 8, and that the court-martial was therefore "illegally constituted" and without jurisdiction. (R. 105, 107-108.) The court rejected respondent's other contentions, holding, *inter alia*, that the record showed substantial compliance with AW 70 in the pre-trial investigation (R. 108-109).

On appeal by petitioner (R. 110) and cross-appeal by respondent (R. 111), the Court of Appeals in affirming, one judge dissenting (R. 140), adopted the reasoning of the District Court on the AW 8 point (R. 136-138).³ But beyond this, the

³ The Court of Appeals was in error in assuming that both the Assistant Trial Judge Advocates detailed to the court-martial were officers of the Judge Advocate General's Department (see R. 136, 137, 138, note 1). Captain Royston, the other assistant, was a member of the Adjutant General's Department. Apparently the court was confused by the letters "AGD" appearing after his name in the order establishing the court-martial. (R. Vol. II, 53.)

Court of Appeals, although recognizing "that it is no longer our province to review the evidence in a court-martial proceeding" (R. 139), held that "The record of this court-martial conviction is replete with highly prejudicial errors and irregularities" (R. 138) which, in their "cumulative effect * * * [lead] unerringly to the conclusion that this petitioner has not been accorded a fair trial, even under military law" (R. 139). The court listed the "errors and irregularities" it had found as follows (R. 138-139):

(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.

(2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.

(3) The record reveals that the law member appointed was grossly incompetent.

(4) There was no pre-trial investigation whatever upon the charge of murder.

(5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.

(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.

In view of its conclusion that respondent's conviction was invalid, "both because his court-mar-

tial was without jurisdiction, and because he has not been afforded due process of law," the court found it unnecessary to pass upon his other assignments of error (R. 140).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In undertaking to review the appointing authority's exercise of discretion under Article of War 8 in designating as law member of a general court-martial an officer not in the Judge Advocate General's Department.
2. In undertaking to review on collateral attack alleged errors and irregularities in the pre-trial and court-martial proceedings which did not affect the jurisdiction of the court-martial.
3. In affirming the order of the District Court discharging respondent from custody.

REASONS FOR GRANTING THE WRIT

1. The decision below on the question raised under AW 8 is erroneous and is in direct conflict with the recent decision of the Second Circuit in *Henry v. Hodges*, 171 F. 2d 401, certiorari denied, 336 U. S. 968. In that case, two officers of the Judge Advocate General's Department—Lt. Colonel Beatty and 2d Lieutenant Swan—were appointed as Defense Counsel and Assistant Trial Judge Advocate, respectively, and they served as such at the trial of Henry and his co-defendant Felman, although Henry was also represented by civilian counsel of his own choosing. Colonel Dar-

ling, Cavalry, was detailed as President and Law Member of the court-martial. At the opening of the trial, Henry challenged Colonel Darling as Law Member for cause under AW 8 and interposed a plea to the jurisdiction of the court-martial on the ground that he was not a member of the Judge Advocate General's Department, whereas Lt. Colonel Beatty, an officer of that department, was available to the appointing authority for detail as Law Member. The court-martial overruled the challenge and plea and these rulings were held correct on review both by the Staff Judge Advocate and the Board of Review. See our brief in opposition, No. 598, O.T. 1948, pp. 10-14. In rejecting Henry's attack upon the jurisdiction of the court-martial based on AW 8, the Second Circuit said (171 F. 2d at 403):

There remains the second question: The irregularity in the constitution of the court, i.e., whether any member of the Judge Advocate General's Department was "available" at the time. We cannot say that it was not more in the interest of justice to detail Beatty to defend Feltman than to put him on the court; or that it was not better judgment to make Swan a prosecutor than a judge; and these were the only officers of the Department whom Henry claims to have been "available." The whole question is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who con-

venes the court must decide what membership will be least to the "injury of the service," and what officers are "available." "Available" means more than presently "accessible"; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot.

This decision of the Second Circuit points up the error in the decisions below. For both courts below considered that Captain Chalkley's appointment to the detail on December 7, 1946, showed conclusively that he, as an officer of the Judge Advocate General's Department, was "available" both on that date and later, in January 1947, when respondent's case was tried.⁴ But those courts overlooked the fact that AW 8 reads, "available for the purpose," i.e., for detail as Law Member, and not merely "available." And they also overlooked the provision of AW 4 (10 U.S.C. 1475), *in pari materia*, that the appointing authority of a court-martial "shall detail as members thereof those officers of the command, who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service

⁴ As noted above, Captain Chalkley was absent from the trial on the verbal orders of the commanding general, and it must be presumed that the latter had good and sufficient reasons for excusing Captain Chalkley. Of course, whether an officer is "available" for a particular trial must be determined as of the date of the trial or shortly before, rather than as of the earlier date of the appointment of the court "for the trial of such persons as may be properly brought before it." (R. Vol. II, 53).

shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts martial in excess of the minority membership thereof." As the Second Circuit pointed out, these provisions vest a large measure of discretion in the appointing authority. He must choose between competing demands for the services of officers within his command. AW 8 imposes no inflexible limitation upon his choice of a Law Member.⁵ "Available for the purpose" does not connote the mere physical presence of an officer or officers of the Judge Advocate General's Department within the command. On the contrary, the choice involves the exercise of an informed judgment based upon an evaluation of the factors enumerated in AW 4 and the exigencies of the moment, which a court is in no position to appraise in retrospect. This Court has consistently held in analogous situations that the exercise of a discretion so broadly vested in the appointing authority will not be reviewed by the courts. *Martin v. Mott*, 12 Wheat. 19, 34-35; *Mullan v. United States*, 140 U. S. 240, 243-245; *Swain v. United States*, 165 U. S. 553, 559-560; cf. *Wade v. Hunter*, 336 U. S. 684, 691-692.

⁵ In contrast, see the new AW 8 which became effective February 1, 1949 (10 U. S. C., Supp. II, 1479), in which the requirement to appoint as law officer a member of the Judge Advocate General's Corps or an officer who is a lawyer certified by the Judge Advocate General to be qualified for such detail, no longer contains the phrase "available for the purpose." And see the new *Manual for Courts-martial* (1949), Section 4(e), p. 3.

We submit, therefore, that the courts below were wrong in substituting their judgment for that of the Commanding General in his choice of the Law Member of the court-martial. The applicable provisions of the Articles of War committed the discretion to him and his judgment may not be reviewed collaterally.

The importance of this question, apart from the conflict between the decision below and the Second Circuit's *Henry* decision, is indicated by the fact that the District Court for the Northern District of Georgia has, since the Court of Appeals' decision came down, ordered the discharge of three more prisoners on the same ground. The Government has taken an appeal in each of these cases. In addition, we are advised that approximately 60 similar cases have been filed by prisoners, chiefly in the Northern District of Georgia, and that the question affects a great but indeterminable number of other prisoners now serving general court-martial sentences.

2. The action of the Court of Appeals in undertaking a censorious review of the court-martial record and its holding that a number of "prejudicial errors and irregularities" which it gleaned from the record were tantamount in their totality to a denial of "due process of law" resulting in the loss of jurisdiction, is in the teeth of the repeated admonitions of this Court that the actions of military tribunals within their jurisdiction are "not subject to judicial review merely because they have

made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions." *In re Yamashita*, 327 U. S. 1, 8, and cases cited. See also *Humphrey v. Smith*, 336 U. S. 695, 696; *Ex parte Quirin*, 317 U. S. 1, 25. Thus, the court below thought that the prosecution proceeded on an erroneous theory that although he was on sentry duty at the time of the killing, respondent was required to retreat from his post (item (1) in the court's listing of errors, *supra*, p. 7); that there was not sufficient evidence of malice, premeditation, or deliberation (item (2)); and that the reviewing authorities were guilty of "a total misconception of the applicable law" in sustaining respondent's conviction (item (6)).⁶ In addition, the court concluded, without elaboration, from its examination of the record that the Law Member and Defense Counsel were incompetent (items (3) and (5)). But these were matters within the exclusive competence of the military authorities to decide. Their "errors of decision," if any there were, are not subject to collateral review on habeas corpus.

⁶ The court's criticism that there was no pre-trial investigation of the charge of murder, but only investigation of an earlier charge of manslaughter (item (4); R. 139, note 4) is obviously irrelevant to the issue of the court-martial's jurisdiction, in view of the recent decision of this Court in *Humphrey v. Smith*, 336 U.S. at 700, that "a failure to conduct pre-trial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments."

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 67-71) is reported at 175 F. 2d 273. The opinion of the District Court (R. 51-54) is reported at 81 F. Supp. 64.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1949 (R. 72). On September 13, 1949, by order of Mr. Justice Black, the time within which to file a petition for a writ of

certiorari was extended to and including September 30, 1949 (R. 72). The petition for a writ of certiorari was filed on September 30, 1949, and was granted on December 5, 1949. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination by the military authority appointing a general court-martial, in detailing as law member thereof an officer not in the Judge Advocate General's Department, that an officer of that Department was "not available for the purpose" within Article of War 8, is subject to collateral attack on habeas corpus.

2. Whether the court-martial proceedings reflect prejudicial errors and irregularities which warrant respondent's release on habeas corpus.

STATUTE INVOLVED

The second paragraph of the 8th Article of War (10 U.S.C. (1946 ed.) 1479), provided at all times relevant hereto as follows:

The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law

member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

STATEMENT

On December 25, 1946, respondent, then a Technician, Fifth Grade, in the Occupation Forces of the United States Army, was on sentry duty in the guardhouse at the motor pool in the town of Feuerbach, Germany (R. Vol. II, 58-59). With him was a German girl named Elizabeth Rehm (R. Vol. II, 63). Two Polish guards, stationed at the motor pool, entered the guardhouse and were ordered to leave by respondent (R. Vol. II, 60). They were both unarmed (R. Vol. II, 79, 87). They left the house and respondent, who had followed, stopped at the door and shot one of them (R. Vol. II, 60), who died as a result of the wound (R. Vol. II, 76). The shooting occurred at about 8:05 P.M. (R. Vol. II, 79-81, 83).

This much is uncontradicted. Respondent was thereafter charged with violation of the 93rd Article of War, covering various crimes including manslaughter, but not murder, and a pretrial investigation was ordered and actually conducted. All available witnesses were examined and the substance of their testimony was reduced to writing. (R. Vol. II, 21, 27-36.) The charges, together with the report of the investigation, were duly referred to the commanding officer who appointed a court-martial and directed the trial of respondent for

violation of the 92nd Article of War, covering murder (R. Vol. II, 23, 53-54; see also R. 4, 11, specification 26 and response thereto). There was no further pretrial investigation. By Special Order 273, thirteen officers were detailed to the general court-martial. The senior officer, Colonel James E. Bush, was designated the law member. Three captains were detailed as trial and assistant trial judge advocates. A major, captain and 1st lieutenant were detailed as defense and assistant defense counsel. The only member of the Judge Advocate General's Department named in the order,¹ Captain Jack H. Chalkley, was designated one of the assistant trial judge advocates. (R. Vol. II, 53.)

The trial was begun on January 9, 1947. Nine members of the court, including the law member, were present. Three had been transferred and one was absent "VOCG" (verbal orders of the commanding general). Also absent VOVG was assistant trial judge advocate Captain Chalkley of the

¹ The court below erroneously assumed that another officer of the Judge Advocate General's Department had been named as assistant trial judge advocate (R. 68). It probably had in mind Captain John E. Royston of the Adjutant General's Department. The initials, AGD, may have been confused with JAGD, which stands for the Judge Advocate General's Department.

The respondent speaks of a Captain Sams (JAGD) as having been available (Special Appearance and Br., pp. 7-8), but he was simply an officer who administered the oath to the officer at Continental Base Section Headquarters who investigated and signed the charges and specifications (R. Vol. II, 22). Captain Sams could not have been in the mind of the Court of Appeals (R. 68) since he was not named an assistant trial judge advocate in the order convening the court martial (R. Vol. II, 53).

Judge Advocate General's Department. The two assistant defense counsel had been transferred. (R. Vol. II, 54-55.) Before any testimony was taken, respondent was asked whom he desired to introduce as defense counsel and replied that he wanted to be defended by the regularly appointed defense counsel (R. Vol. II, 55). Being then informed that he could challenge any member of the court for cause and any one member, other than the law member, peremptorily, he made no challenge (R. Vol. II, 56). He pleaded not guilty (R. Vol. II, 57) and the trial proceeded (R. Vol. II, 58-77). Respondent, having been advised as to his rights, then declared that he wanted to take the stand and make a sworn statement (R. Vol. II, 77).

His version of the events leading to the shooting was that the two Polish guards came into the guard hut, as he thought, to get warm. But they "grabbed the girl and started saying something or other to her" (R. Vol. II, 81). He told them to leave and "one of them struck his fist at me on the lip" (R. Vol. II, 78, 81-82). He again told them to leave and they did so after a very short interval (R. Vol. II, 81-82). He then took his pistol from "behind the coal box at the guardhouse" and "walked to the door" (R. Vol. II, 78, 82). The deceased, who was two or three feet from the door, swung a bottle at him three times, missing him each time. Respondent loaded his pistol and, as the deceased swung around again, shot him (R. Vol. II, 83-84).

The surviving Polish guard categorically denied that there was any violence inside the guardhouse, that either he or the deceased had had a bottle of any description at the time and place of the occurrence or that anyone was struck at with a bottle or other instrument (R. Vol. II, 86). On the contrary, this witness testified that he and his companion entered the guardhouse, he said "good evening", and that respondent thereupon drew his pistol and ordered them out. They left but respondent followed them and stopped at the door. When they were about a meter away from him the witness said, "Boy, it is OK what you do." Respondent then fired the fatal shot. (R. Vol. II, 59-60.) This testimony, in substantial respects, was corroborated by the only other eye witness, Elizabeth Rehm, the German girl who was present at the time of the shooting (R. Vol. II, 63-68). She confirmed that the Polish guards entered, said "Hello", were ordered out and left, and that respondent went to the door and fired the shot after something was said (R. Vol. II, 65, 66, 68). Two American soldiers who came to the scene within about four minutes of the shooting testified that they saw no bottle any place around the guardhouse (R. Vol. II, 72, 75-76).

The case was continued until January 14, 1947, on which date two more members of the court, having been transferred, were absent (R. Vol. II, 91). On this occasion, a witness, who had relieved respondent on guard duty between 8:30 and 9:00 P.M.

on the night of the shooting, was called and he testified that he had seen a bottle about twelve inches long and three inches in diameter inside the guardhouse (R. Vol. II, 93-94). Respondent, recalled at his own request, testified that he had picked up the bottle and set it down inside the door of the guardhouse after the deceased had dropped it (R. Vol. II, 95-96).

Respondent was found guilty upon the concurrence of two-thirds of the members of the court and, three-fourths of the members agreeing, was sentenced to be dishonorably discharged, to forfeit all pay and allowances and to be confined at hard labor for life (R. Vol. II, 96-97).

Pursuant to the 46th Article of War (10 U. S. C. 1517), the Staff Judge Advocate reviewed the record and recommended approval of the sentence (R. Vol. II, 15-20), which was approved by the appointing authority (R. Vol. II, 98).

The Board of Review of the Office of the Judge Advocate General, pursuant to AW 501 $\frac{1}{2}$ (10 U. S. C. 1522), held, on review, that the record was legally sufficient to support the sentence (R. Vol. II, 5-6). The Judge Advocate General approved this holding but recommended a reduction of the term of confinement to twenty years (R. Vol. II, 6-7). This recommendation was followed in General Orders No. 190, which designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct, as the place of confinement (R. Vol. II, 7-8). Re-

spondent was committed to the United States Penitentiary, Atlanta, Georgia, on September 24, 1947 (R. 15-16).

Respondent, on July 16, 1948, petitioned the District Court for the Northern District of Georgia for a writ of habeas corpus alleging, as thrice amended (R. 1-8, 18-20, 22-24), that the court-martial was not legally constituted under the provisions of AW 8 and was therefore without jurisdiction because the law member was not an officer of the Judge Advocate General's Department, although an officer of that department "was available for the purpose" (R. 19); that the sentence was invalid because it was based upon a finding of guilty by only two-thirds instead of three-fourths of the members of the court (R. 7); that the pre-trial investigation was not thorough and failed to comply with the requirements of AW 70 (10 U. S. C. 1542) in other respects (R. 3-6, 18-19, 22-23); and that he was not afforded the effective assistance of counsel at the trial (R. 6-7, 23-24, 50).

The writ issued (R. 32) and upon the hearing, at which respondent was the sole witness (R. 37-50), and review of the record of the court-martial (Vol. II of the record here), the district court sustained the writ, directing petitioner to discharge respondent from custody. Rejecting all of respondent's other objections, the decision rested exclusively upon the holding that failure to designate as law member a member of the Judge Advocate General's Department when one, Captain Chalkley, was avail-

able, deprived the court-martial of jurisdiction to which compliance with AW 8 was a condition precedent (R. 51-54).

On appeal by petitioner (R. 54) and cross-appeal by respondent (R. 55), the Court of Appeals, in affirming, one judge dissenting (R. 71), adopted the reasoning of the district court on the AW 8 point (R. 67-70). But beyond this, the majority, although recognizing "that it is no longer our province to review the evidence in a court-martial proceeding" (R. 71), held that "The record of this court-martial conviction is replete with highly prejudicial errors and irregularities" (R. 70) which, in their "cumulative effect * * * [lead] unerringly to the conclusion that this petitioner has not been accorded a fair trial, even under military law" (R. 71). The court listed the "errors and irregularities" it had found as follows (R. 70):

(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.

(2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.

(3) The record reveals that the law member appointed was grossly incompetent.

(4) There was no pretrial investigation whatever upon the charge of murder.

(5) The record shows that counsel appointed to defend the accused was incompetent, gave

no preparation to the case, and submitted only a token defense.

(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.

In view of its conclusion that respondent's conviction was invalid, "both because his court-martial was without jurisdiction, and because he has not been afforded due process of law," the court found it unnecessary to pass upon his other assignments of error (R. 71).

SUMMARY OF ARGUMENT

I

A. AW 8 permits the authority appointing a court-martial to detail a law member who is not an officer of the Judge Advocate General's Department "when an officer of that department is not available *for the purpose*" (emphasis supplied). As Judge Learned Hand recently said in rendering a decision of the Court of Appeals for the Second Circuit, the determination of availability "for the purpose" "demands a balance between the conflicting demands upon the service, and it must be determined on the spot." *Henry v. Hodges*, 171 F. 2d 401, 403, certiorari denied, 336 U. S. 968.

This Court has held that the decision of the authority appointing a court-martial as to the composition of the court within the outside limits fixed by statute must be conclusive. *Martin v. Mott*,

12 Wheat. 19; *Mullan v. United States*, 140 U. S. 240; *Swain v. United States*, 165 U. S. 553; *Bishop v. United States*, 197 U. S. 334; *Kahn v. Anderson*, 255 U. S. 1. And that principle was well established when, in 1920, Congress enacted AW 8.

B. The legislative history confirms the conclusion which may be derived alone from a reading of AW 8 in the light of this Court's earlier decisions. It plainly appears that Congress proposed to confer on the appointing authority power not only to determine the mere physical availability of a JAG officer but the relative suitability of an officer of the JAG and others qualified to act as law member under AW 8. It is clear, also, from the legislative history, that the appointing authority's discretionary power is one whose exercise cannot be challenged in the civil courts as jurisdictional error.

The 1949 amendment of AW 8 was not declaratory; it worked a distinct change in the provisions applicable to the detail of a law member of a court-martial. It can only be concluded from the history of this amendment that Congress understood AW 8, as it stood at the date of respondent's court-martial, as investing in the appointing authority a complete discretionary power to determine whether an officer of the Judge Advocate General's Department was "available for the purpose" of serving as law member of a court-martial.

C. The Army has consistently construed AW 8 as granting to the appointing authority the power finally to decide whether "the interests of efficient administration of justice and exercise of command" (CM 209988, *Cromwell*, 9 B. R. 169, 196 (1938)) demand the appointment as law member of one other than an officer of the Judge Advocate General's Department. This interpretation is entitled to great weight. *United States ex rel. Hirshberg v. Cooke*, 336 U. S. 210, 216.

D. There is nothing on the face of the order convening the court-martial which tried respondent to indicate that the appointing authority abused his discretion in failing to detail as law member an officer of the Judge Advocate General's Department. That such an officer was detailed to be an assistant trial judge advocate may signify his physical availability, nothing more. But, as we have seen, the appointing authority must consider not only physical availability but relative suitability.

II

A. While paying lip-service to the rule that civil courts have power to determine only whether the court-martial had jurisdiction, the court below concluded that respondent should be released on habeas corpus largely because its views as to the law and the evidence differed from what it thought, in part mistakenly, were those of the appropriate military tribunals. But errors in rulings on fact and law

are not bases for habeas corpus; in this case, moreover, the military decisions were well grounded.

B. To assume to judge, as did the court below, of the competency of members of the court-martial is treacherous business. And there is no warrant in the record for the conclusion that the law member was so incompetent and defense counsel so inadequate as to make respondent's military trial unfair.

C. Respondent did, in fact, have the substantial benefits of the pre-trial investigation for which provision is made in AW 70. In any event, failure to comply with AW 70 is not ground for habeas corpus. *Humphrey v. Smith*, 336 U. S. 695.

ARGUMENT

I

The Determination of the Authority Appointing a General Court-Martial That an Officer of the Judge Advocate General's Department Is Not Available for Detail as Law Member Is Conclusive, and Not Subject to Review

A. AW 8, read in the light of decisions of this Court rendered before its enactment, confers on the appointing authority a complete discretion.—

The language of the statute which requires the detail of a law member of a general court-martial, AW 8, confers a broad discretion on the appointing authority. He must detail a law member

* * * who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not avail-

able for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specifically qualified to perform the duties of law member. * * *

The statute reads "available for the purpose," not merely "available." Consequently, as the Judge Advocate General has held, AW 8 "imports not only the narrow concept of physical accessibility, but also the broader concept of discretion in the determination of the suitability of the person." CM 231963, Hatteberg, 18 B. R. 349, 368 (1943), summarized in 2 Bull. JAG, p. 304, sec. 365(9); cf. CM ETO 804, O Detree, 2 B. R. (ETO) 337 (1943), summarized in 2 Bull. JAG, p. 466, sec. 365(9); CM 209988, Cromwell, 9 B. R. 169, 196 (1938); Dig. Op. JAG (1912-1940), sec. 365(9)(6), p. 176.²

This view was sustained in *Henry v. Hodges*, 171 F.2d 401 (C. A. 2), certiorari denied, 336 U. S. 968, in which the court (per L. Hand, J.) said at p. 403:

There remains the second question: The irregularity in the constitution of the court, i.e., whether any member of the Judge Advocate General's Department was "available" at the time. We cannot say that it was not more in the interest of justice to detail Beatty to defend Feltman than to put him on the court; or that it was not better judgment to make Swan a

² For a discussion of these court-martial cases see *infra*, pp. 27-30.

prosecutor than a judge; and these were the only officers of the Department whom Henry claims to have been "available." The whole question is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who convenes the court must decide what membership will be least to the "injury of the service," and what officers are "available." "Available" means more than presently "accessible"; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot.

Under AW 8, the appointing authority, as we think the Second Circuit correctly pointed out, is not limited to determining the physical availability; he must decide whether, as required by AW 4, the person detailed is "best qualified for the duty by reason of age, training, experience and judicial temperament". The mere fact, therefore, that Captain Chalkley, a JAG officer, was appointed assistant trial judge advocate of the court which tried respondent affords no basis for the assumption made below that he was available for the purpose of acting as law member, or that he was better qualified than Col. James E. Bush, the senior officer, who was actually designated. The considerations controlling the determination of availability obviously required the exercise of discretion in view of the circumstances immediately prevailing which a

court cannot adequately judge in retrospect.³ See also *infra*, pp. 36-37.

This Court has held, in circumstances closely paralleling those at bar, that the exercise of so broad a discretionary power as that here conferred, will not be reviewed in the courts. *Martin v. Mott*, 12 Wheat. 19; *Mullan v. United States*, 140 U. S. 240; *Swaim v. United States*, 165 U. S. 553; *Bishop v. United States*, 197 U. S. 334; *Kahn v. Anderson*, 255 U. S. 1. Of these cases, four were decided before AW 8 was enacted in 1920. Their teaching cannot be presumed to have been lost on Congress.

In *Martin v. Mott*, *supra*, reliance was placed on AW 64 of 1806 (Act of April 10, 1806, c. 20, 2 Stat. 359, 367) which provided that

General courts martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

It was contended that the court-martial was not composed of the proper number of officers required by law. But the Court held, *per* Story, J. (12 Wheat. at 35), "that the act is merely directory to

³ The respondent does not suggest that AW 8 required the appointment of a lawyer as law member even if a JAG officer was not "available for the purpose." No such contention is advanced no doubt because AW 8 would specifically have so provided if that had been intended (see *infra*, pp. 21, 24-26) and, consequently, AW 8 has never been so understood (see Wiener, *Military Justice for the Field Soldier* (1944 ed.) p. 64).

the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive."

Similarly, in *Mullan v. United States, supra*, the statutory provision in question was Article for the Government of the Navy 39 (R. S. 1624), reading in pertinent part as follows:

A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried. * * *

Mullan, an officer in the Navy, was tried on board a naval vessel at Hong Kong by a court-martial of seven officers, five of whom were junior to him. He established that at the time of the organization of the court-martial there were twelve more officers of higher rank than he on waiting orders in the City of Washington, and that, at about the same time, seven officers had been sent from New York to Panama for the trial of a medical officer there, in view of the fact that in the squadron at Panama there were not the requisite number of officers of sufficient rank to organize the court for that trial.

This Court held, on the authority of *Martin v. Mott*, that the judgment of the appointing authority could not be collaterally attacked, saying (140 U. S. at 245):

* * * Whether the interests of the service admitted of a postponement of his trial until a court could be organized of which at least one-half of its members, exclusive of the President, would be his seniors in rank, or whether the interests of the service required a prompt trial, upon the charges preferred, by such officers as could be then assigned to that duty by the commander-in-chief of the squadron, were matters committed by the statute to the determination of that officer. And the courts must assume—nothing to the contrary appearing upon the face of the order convening the court—that the discretion conferred upon him was properly exercised, and, therefore, that the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided “without injury to the service.” “Whenever,” this court said in *Martin v. Mott*, 12 Wheat. 19, 31, “a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.”

An analogous situation was presented in the *Swain* case. AW 79 of 1874 (R. S. 1342) provided that—

Officers shall be tried only by general courts-martial; and no officer shall, when it can be

avoided, be tried by officers inferior to him in rank.

Swaim, a brigadier general, was tried by a court-martial composed of 11 officers, of whom 6 were only colonels, at a time when there were, exclusive of himself, nineteen general officers in the Army (28 C. Cls. at 184, 202); and he accordingly contended that the court-martial was illegally constituted. But this Court held that the discretion of the President, who had convened the court-martial, could not be collaterally attacked. It said (165 U. S. at 560):

In the present case, several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance, or the injury to the public interests by detaching officers from their stations. The presumption must be that the President, in detailing the officers named to compose the court-martial, acted in pursuance of law. The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.*

* In *Bishop v. United States*, 197 U.S. 334, the Court reiterated the rule announced in the above-cited cases but went on to say that an alleged defect in the composition of the court martial was not only a waivable objection but one which had in fact been waived. When this Court's ruling in that respect (197 U.S. 340) is compared with what happened at respondent's arraignment here (R. Vol. II, 56), it would seem clear that this case can be disposed of on the ground that respondent waived any right to object to the alleged violation of AW 8 in failing to designate a JAG officer as law member.

That Congress, in enacting AW 8, intended no broader review of the appointing authority's determination than is reflected in the foregoing decisions is evidenced by the flexibility provided with respect to participation by the law member in any particular court-martial proceeding. The settled rule is that when the order convening the court-martial does not contain a specific contrary provision, as it does not here (R. Vol. II, 53-54), the presence of the law member at the court-martial sessions is not essential. See Section 38(c), p. 28, Section 51, p. 39, Manual for Courts-Martial, 1928; Digest of Opinions JAG, 1912-1940, § 365 (10), p. 176; see also question 5 of the General Court-Martial Data Sheet (R. Vol. II, 11).⁵ To impose strict judicial supervision over the appointing authority's discretion in detailing a law member even though a properly detailed law member need not participate at any particular session would indeed be strange. The proper conclusion, so far as the courts are concerned, is to abide the appointing authority's determination both as to the officer appropriately to be designated as law member and as to whether, in a particular case, he should be excused from attendance. Judicial inquiry beyond the facts appearing on the face of the order convening the court-martial (see *Mullan v. United States*, quoted *supra*, pp. 17-

⁵ The present AW 8, effective February 1, 1949 (10 U.S.C. Supp. II, 1479), forbids the performance of the vital functions of the court-martial in the absence of the law member. See *infra*, pp. 24-26.

18 and see *infra*, pp. ~~46-52~~⁴⁶⁻⁵³) would be inconsistent with settled doctrines established by this Court and understood by Congress when AW 8 was enacted.

B. *The legislative history of AW 8 indicates a Congressional purpose to confer on the appointing authority a discretion to determine more than the physical availability of a JAG officer.*—Sole reliance for discerning the Congressional purpose in AW 8 need not be placed on the fact that this Court's decisions, referred to above, were available to Congress at the time of its enactment. For it appears, additionally, that in its consideration of the bills which became the 1920 Articles of War, Congress had before it a proposal in the following language:

No person shall be appointed judge advocate for a general court unless at the time of his appointment he is an officer of the Judge Advocate General's Department, except that when an officer of that department is not available the appointing authority shall appoint an officer recommended by the Judge Advocate General of the Army as specially qualified by reason of legal learning and experience to act as judge advocate, * * *

It is to be understood that the reference in this proposed bill (S. 64, 66th Cong., 1st Sess., Art. 12)* to the position of "judge advocate" was not to

* This bill is printed in Hearings on S. 64 before a Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st Sess., p. 5.

what is now known as the "trial judge advocate" but, rather, to one who, though not a member of the court, was required "fairly, impartially, and in a judicial manner" to perform functions akin to those now performed by the law member.⁷

What is of significance now is the addition in AW 8, as enacted, of the phrase "for the purpose" to the provision in S. 64 for a substitute appointment "when an officer of that department is not available". This developmental history of AW 8 certainly confirms the Judge Advocate General's view, to which reference has already been made (*supra*, p. 14) that AW 8 "imports not only the narrow concept of physical accessibility, but also the broader concept of discretion in the determination of the suitability of the person".

There is evidence, too, that in determining "availability for the purpose", the appointing authority was to have a discretion subject to even less review, if that is possible, than that theretofore accorded by this Court to similar determinations by military appointing authorities. For in *Martin v. Mott*, 12 Wheat. 19, *Mullan v. United States*, 140 U.S. 240, and *Bishop v. United States*, 197 U.S. 334, the statutory guides to the appointing authority were to detail a court of thirteen where

⁷ The Act of June 4, 1920, c. 227, 41 Stat. 759, contained two chapters. The first reorganized the military establishment; Section 8 (41 Stat. at 765) provided for a JAGD consisting of one Judge Advocate General and 114 other officers. The second chapter revised the Articles of War, and provided, for the first time in American legislation, for law members of general courts-martial (AW 8; 41 Stat. at 788).

that could be accomplished either "without manifest injury to the service" or "without injury to the service". See *supra*, pp. 16, 17, 19. In the hearings on the bills which eventuated in the 1920 Act, previously referred to, Major General Enoch H. Crowder, then Judge Advocate General, United States Army, conveyed to Congress his understanding that "serious injury to the service" might impose more stringent limitations on a discretionary power than a direction to determine "availability". In discussing a proposed change in the then existing AW 17, which provided in relevant part that "The accused shall have the right to be represented before the court by counsel of his own selection for his defense *if such counsel be reasonably available, * * **" (emphasis supplied), General Crowder stated at page 1165 of the Hearings:

The provision here "reasonably available," is sought to be eliminated in the bill before you (art. 22) and it will bring up for consideration the case that I presented to the committee at the time the 1916 revision was under consideration, an actual case of an officer being tried by a court-martial in Alaska for embezzlement, making an application for the professor of law at the Military School, Staff College, at Leavenworth, to be sent all the way to Alaska for his defense. It might result in an accused person undergoing trial in Mindanao, in the Philippine Islands, applying for some man serving in Alaska to act as

his counsel. Upon that explanation, the Military Committee of the House, which first wanted to grant the right of counsel in absolute terms, qualified it by the language "if such counsel be reasonably available." The corresponding provisions of the pending bill is that military counsel of the accused's selection shall be assigned, unless the appointing authority shall certify that "serious injury to the service" would result from the detail. What is serious injury? Is it to be measured in dollars and cents of transportation or mileage? Is one class of duty to be measured against another? Are we here in the field of prejudicial error; or, because compliance with a statute is involved, are we in the field of jurisdictional error?

The term "reasonably available" was thus deliberately retained in AW 17 of 1920 with respect to military counsel, in order to vest in the appointing authority a broad discretion in the matter of affording an accused such counsel—a discretion whose exercise could not be challenged as jurisdictional error. The use of the cognate phrase "available for the purpose" in AW 8 clearly evidences an identical purpose.

The present AW 8 which became effective on February 1, 1949 (10 U.S.C., Supp. II, 1479) omits the phrase "available for the purpose."* It pro-

* The new AW 8 provides in relevant part: "The authority appointing a court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Corps or an officer who is a member of

vides further that no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The appointment as law member of a court-martial of either an officer of the Judge Advocate General's Corps or one who is a member of the bar, and the presence of the law member during the trial, balloting and sentence are thus now expressly made mandatory. The legislative history of this new AW 8 (Act of June 24, 1948, c. 625, Title II, Section 205, 62 Stat. 628) shows that in these respects it effected a change in the provisions of the pre-existing AW 8. In 1946, the House Committee on Military Affairs, after a year's study of "court-martial procedure and the entire judicial system of the Army," H. Rep. No. 2722, 79th Congress, Second Session, pp. 2-3, made, among others, the following recommendation to the House:

Recommendation 4

That article of war 8 be amended in such manner as to require that the law member of a general court martial be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal

the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: *Provided*, that no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. * * *

court, or the highest court of a State or Territory of the United States;

* * * * *

That failure to observe the foregoing provisions shall constitute a jurisdictional error:

* * *

On April 14, 1947, Kenneth C. Royall, then Under Secretary of War, testifying before the House of Representatives Committee on Armed Services, Sub-Committee 11, Legal, outlining some of the principal changes in H.R. 2575, the bill which was incorporated in substance in S. 2655, 80th Congress, 1st Sess., which eventually became the 1948 Act, said:

It is made a jurisdictional requirement * * * that the law members of general courts-martial must be either officers of the Judge Advocate General's Department or if there are not enough of those, as will sometimes arise in certain situations, trained lawyers designated as qualified by the Judge Advocate General. * * * [No. 125, Subcommittee Hearings on H.R. 2575 to amend the Articles of War, to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes, p. 1918.]

Finally, the 1949 Manual for Courts-Martial, at page 3, states for the first time: "Failure to appoint a law member of a general court-martial

who is qualified as prescribed in Article 8 renders any proceeding of such a court void."

We submit that the foregoing makes inescapable the conclusion that AW 8, as it stood at the date of respondent's court-martial, was intended to be construed as investing in the appointing authority the discretion and final authority, not subject to civil review, to determine whether an officer of the Judge Advocate General's Department was "available for the purpose" of serving as law member of a court-martial.

C. *AW 8 has been consistently interpreted and applied by the Army as vesting a complete discretion in the appointing authority.*—In CM 209988, Cromwell, 9 B. R. 169, 196 (1938), the Board of Review, affirming the conviction of the accused, said:

Counsel contend that a member of the Judge Advocate General's Department should have been appointed law member of the court. The requirement of Article of War 8 for detail of officers of the Judge Advocate General's Department as law members of general courts-martial is subject to the exception that another qualified officer is to be appointed when an officer of the Judge Advocate General's Department is not available. The appointment of an officer other than a member of the Judge Advocate General's Department as a law member imports a decision by the appointing authority that an officer of this category is not available for the duty. Such a decision reached

in the exercise of a sound discretion must, in the interests of efficient administration of justice and exercise of command, be held to be conclusive upon the question of availability. The discretion lodged in the appointing authority in this respect does not differ in principle from that formerly lodged in the appointing authority with respect to the number of officers, within prescribed maximum and minimum limits, which might be appointed as members. In that connection it was held that the decision of the appointing authority, in the exercise of his discretion, was conclusive. *Martin v. Mott*, 25 U. S. (12 Wharton) 19, 35. See also par. 7, M. C. M., 1917.

In CM 231963, Hatteberg, 18 B. R. 349, the Judge Advocate General declined to concur in the opinion of the Board of Review that the court-martial was illegally constituted because the law member was not an officer of the Judge Advocate General's Department although two other members of the court were such officers. The Judge Advocate General said, at page 368:

From the above precedents it appears that the word "available" imports not only the narrow concept of physical accessibility but also the broader concept of discretion in the determination of the suitability of the person or thing desired * * *.

Then, citing with approval the above quoted language from the *Cromwell* case, he went on:

The above decision and many others similar thereto recognize the basic principle that military justice and the rules and regulations governing trial by courts-martial are designed to meet the needs of efficient military administration, which places substance above form, and justice above the appearance of justice.

2 Bull. JAG, p. 466, Section 365(9) summarizing CM ETO 804, Ogletree, 2 B. R. (ETO) 337 (1943) states:

Accused was found guilty of assault with intent to do bodily harm with a dangerous weapon in violation of A. W. 93. The defense challenged the law member for cause, on the ground that he was not a member of The Judge Advocate General's Department and that officers of that department were available to the appointing authority for appointment as law member. After taking evidence as to the question of availability, the court refused to sustain the challenge. Held: The record is legally sufficient to support the findings and sentence. The designation of a law member was a matter for the exclusive determination of the appointing authority, was not subject to review by the court on a challenge for cause, and cannot be reexamined by the Board of Review. The ruling of the court denying the challenge was correct, but evidence should not have been received on the question of availability. [Cf. CM 231963, 2 Bull. JAG 304, August 1943.] CM ETO 804 (1943).

Section 365(9), p. 175, Digest of Opinions of the Judge Advocate General (1912-1940) makes the following statement:

It is not necessary for the convening order to state that the ranking member of a general court-martial is especially qualified for law member thereof, when the ranking member is designated as law member. The specific designation of the ranking member of the court as law member thereof imports that, in the opinion of the convening authority, he is especially qualified for that position. In cases already tried in which the ranking member of the court was designated as law member without explanation, such action is not irregular or prejudicial to the substantial rights of the accused. 250.43, April 6, 1921.

Moreover, as we have already pointed out, *supra*, p. 20, the presence of the law member at the proceedings of the court-martial was not essential unless the convening order required it. And the convening order did not always do so. Had the law member provision of AW 8 been regarded as jurisdictional, logic would have dictated that the presence of the law member at proceedings of the court-martial be made mandatory in all cases.

This consistency of interpretation by the Army is of great significance in determining the proper construction of AW 8. " * * * the manner in which court-martial jurisdiction has long been exercised by the Army and Navy is entitled to great

weight in interpreting the Articles." *United States ex rel. Hirshberg v. Cooke*, 336 U. S. 210, 216; see also *United States v. Johnston*, 124 U. S. 236, 253.

D. Nothing appears on the face of the order convening the court-martial which suggests an improper exercise of the appointing authority's discretion.—If the determination of the appointing authority in this case, that an officer of the JAG was "not available for the purpose" of serving as law member, is reviewable at all, that review must be limited, as indicated in *Mullan v. United States*, 140 U. S. 240, 245, quoted *supra*, p. 18, to the facts "appearing upon the face of the order convening the court". But the only fact appearing on the face of the order in this case is that Captain Chalkley, an officer of the Judge Advocate General's Department, was available for service as an assistant trial judge advocate.⁹ This may suffice to show physical availability;¹⁰ it certainly shows no more.

There may have been the very best of reasons why the appointing authority considered Captain Chalkley "not available for the purpose" of serving as law member. Certainly, it cannot be said

⁹ It has already been pointed out, *supra*, note 1, p. 4, that the Court of Appeals was in error when it stated that two members of the Judge Advocate General's Department were detailed "to serve as assistant trial judge advocates". (R. 68.)

¹⁰ As has been noted, *supra*, p. 4, Captain Chalkley was in fact absent "VOCG" (verbal orders of the commanding general) from respondent's trial.

that he was better qualified to perform the duties of law member than was Colonel Bush, the latter then an officer of more than twenty-five years' commissioned service.¹¹ There is no fixed rule of law or fact that every officer of the JAGD is, *virtute officii*, qualified to rule on questions of evidence arising in the course of a trial; there are many lawyers even in civil life, of eminence and ability, whose talents do not lie in that direction.

The duties of the Judge Advocate General's Department are manifold. Officers of that department are utilized at all levels of administration of military justice, not to speak of their usefulness as legal advisers to other branches of the service engaged in other operations. JAG officers perform investigative functions, make recommendations as to prosecution, serve as defense counsel or trial judge advocates, and review, in several stages, the court-martial determinations.¹² The question of availability of a JAG officer for the purpose of serving as law member is thus not to be answered in terms of his physical proximity to the court-

¹¹ Official Army Register (1949) p. 77 (Bush, James Emerson, 010332).

¹² See Pasley & Larkin, *The Navy Court Martial: Proposals for its Reform*, 33 Cornell Law Quarterly, 195, 208: "[In the Army] During World War II, because of the shortage of judge advocate officers, it was the exception rather than the rule for one to be appointed as law member (the exceptions usually being cases of especial complexity or seriousness), although judge advocate officers were frequently detailed as trial judge advocate." If the decision below is sound there must necessarily, therefore, be a wholesale release from confinement of convicted Army personnel.

martial. See *Henry v. Hodges*, 171 F. 2d 401, 403, *supra*, pp. 14-15. For the needs of the service, the particular abilities and experience of the officers, JAG and others, to serve as law members cannot be ignored.

It follows that respondent's showing of Captain Chalkley's physical availability for detail as law member does not suffice as a showing that the appointing authority abused his discretion in failing to appoint the Captain to the post.

II

There Are No Other Grounds for Respondent's Release on Habeas Corpus

Apart from its ruling that the order convening the court-martial did not comport with the requirements of AW 8, the court below held that respondent had been denied due process of law. It cited what it referred to as "a few patent instances," the totality of which required respondent's discharge from custody (R. 70):

1. Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.

2. Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.

3. The record reveals that the law member appointed was grossly incompetent.

4. There was no pre-trial investigation whatever upon the charge of murder.

5. The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.

6. The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.

Because of the difficulties inherent in dealing with a "cumulative" (R. 71) judgment, short of urging this Court to read the court-martial record for itself, we must deal with the particular alleged irregularities cited by the court below. At the outset, however, it should be noted that on habeas corpus, a civil court can determine only whether a military court-martial was without jurisdiction; other matters are left for review by military authority. *In re Yamashita*, 327 U. S. 1, 8. See also *Humphrey v. Smith*, 336 U. S. 695, 696; *Ex parte Quirin*, 317 U. S. 1, 25; *Grafton v. United States*, 206 U. S. 333, 345-348; *Carter v. McClaughry*, 183 U. S. 365, 381; *Johnson v. Sayre*, 158 U. S. 109, 118; *Smith v. Whitney*, 116 U. S. 167, 177; *Kurtz v. Moffitt*, 115 U. S. 487, 500; *Keyes v. United States*, 109 U. S. 336, 340; *Ex parte Reed*, 100 U. S. 13, 23. As this Court said *In re Grimley*, 137 U. S. 147 at page 150:

* * * it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a

court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established the habeas corpus must be denied and the petitioner remanded.

A. The theory of law applied by the Army and the evidence of premeditation.—The view of the court below that an erroneous theory of the duty to retreat was applied to respondent, that the evidence did not measure up to malice, premeditation or deliberation, and that the army reviewing authorities mistook the applicable law (instances 1, 2, and 6, *supra*, p. 33) is not only beyond that court's jurisdiction to assert; it is, in addition, baseless.

To begin with, the reviewing authority did not hold, as was said below, that respondent should have retreated from his post of duty. The reviewing staff Judge Advocate said (R. Vol. II, 17-18):

The rule is further qualified by the important principle that before a person may take life in defense of his own, he must have retreated as far as he safely can. No evidence was offered that accused in this case could not have withdrawn within the shack, closed the door, and thereby avoided further conflict with the two Poles.

This did not call for a retreat from post of duty. On the contrary, it required nothing more than closing the door to those causing the trouble who had already left the post.

That portion of the staff Judge Advocate's opinion upon which the judgment of the court below was apparently based certainly does not imply that respondent should have retreated from his post (R. Vol. II, 17):

* * * Even had the Pole swung at accused with a bottle as is stated by the accused, such act was not sufficient to justify the shooting. To excuse a killing on the grounds of self-defense upon a sudden affray, the killing must have been believed, on reasonable grounds, by the person doing the killing, to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed, on reasonable grounds, to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can (Par. 148a, MCM 1928, page 163). "When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die." (*Comm. v. Drum*, 58 Pa. St. 992) (XXI Board of Review, JAG, page 271, CM 235044 *Winters*).

There is, in this extract, nothing inconsistent with the view, previously quoted, that respondent was required at least to show why he could not retreat into his shack. Moreover, these comments were nothing more than an "even if" assumption, *arguendo*, that respondent's version of the killing was credible, an assumption which was expressly

rejected: "Taken as a whole the testimony of the accused, insofar as it is suggestive of a theory that he acted in self-defense, is not convincing." (R. Vol. II, 17.) More basically, what the majority below overlooked in holding that the accused was under no duty whatever to retreat was that its views in that respect are not engraven in the Constitution and need not control military tribunals. The 1928 Manual for Courts-Martial, prescribed by executive order of the President, pursuant to Act of Congress (see p. IX of Manual), provided at par. 148a, p. 163:

To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can.

Considering this provision in connection with respondent's own statement that the Polish guards were unarmed and that when they left he took his pistol and followed them to the door (R. Vol. II, 79, 82), we think that there was adequate support, even in respondent's own version of the killing, for the conclusion that he had not made out a case of self-defense.

It follows, therefore, that the majority below made the two-fold error, on the one hand, of reviewing what was not reviewable and, on the other hand, of holding that a determination in accordance with the pertinent military law was a denial of due process. As was said in *United States ex rel. French v. Weeks*, 259 U. S. 326, 335:

As a Colonel in the Army, the relator was subject to military law and the principles of that law, as provided by Congress, constituted for him due process of law in a constitutional sense. *Reaves v. Ainsworth*, 219 U. S. 296, 304.

See also the *United States ex rel Creary v. Weeks*, 259 U. S. 336, 344.

But, in any event, the decision below attributed to the court-martial the reasoning of the reviewing staff judge advocate. It is possible and altogether likely, however, that the court-martial rejected as incredible respondent's account of the occurrence and accepted the testimony of the two eye witnesses who were present. The surviving Polish guard stated that he and his companion had entered the guardhouse and were ordered out. They left. This was confirmed by the German girl who was with respondent. The Polish witness denied that anyone had struck anyone or that there had been any violence of any kind in the guardhouse. Respondent went to the door with a pistol in his hand. That the deceased should have used a bottle to attack a man armed with a pistol borders on the incredible,

and the surviving Polish guard categorically denied that he had done so or that either had done any more than say, "Boy, it is OK what you do." Furthermore, no bottle was discovered at the scene by either of the two American soldiers who arrived almost immediately after the shooting. A bottle was seen at the guardhouse by Private Wesoelewski, who relieved respondent as guard, between 8:30 and 9:00 P.M., which was a half hour to an hour after respondent came to the guardhouse and almost as long after the shooting, which occurred within five minutes of the time respondent went on duty. Respondent testified, without fixing the time, that after he shot the deceased, he picked the bottle up from the ground where it had been dropped and placed it inside the door of the guardhouse. But it was obviously possible, and the court-martial could properly have so found, that, during the interval between the arrival of the American soldiers who saw no bottle and that of the relief guard, respondent, having decided upon his story, fixed upon a bottle that had been within the shack and placed it where it was seen. So also the court-martial could, with propriety, have found that respondent shot the deceased in cold blood, without provocation of any kind. On this theory, amply supported by the credible evidence, respondent did the killing with malice, premeditation and deliberation. We submit that the record completely supports the verdict, the validity of which would not be affected even if the reviewing authority had approved it on a mis-

taken theory of law. It seems clear that there were errors of neither fact nor law by the military; and even if there were, such errors would be no ground for habeas corpus.

B. The competence of the law member and defense counsel.—The criticisms of the competence of the law member and defense counsel (instances 3 and 5, *supra*, p. 33) are without substance. As to the former, the short answer is that he made no ruling prejudicial to respondent. While he obviously misapprehended the nature of leading questions, his rulings in the main restricted the prosecution (R. Vol. II, 61, 63, 64, 66, 74). On the other hand, the sustaining of the objection to the question by the defense as to who a witness, who had not been present at the time, thought did the shooting (R. Vol. II, 75) was obviously correct. So also was the ruling that Miss Rehm's answer to the question as to the whereabouts of the deceased that "He was dead—I didn't know it at the time", was irresponsive (R. Vol. II, 66). And while the ruling that the defense would have to recall a witness, then on the stand, in order to question him (R. Vol. II, 92) was unduly technical, it was entirely harmless since the witness was recalled and questioned by the defense (R. Vol. II, 93-94).

As for the defense counsel, his competence cannot properly be judged outside the framework of the facts that hemmed him in. Respondent had told him he had no witnesses and "didn't know any-

thing to tell him". (R. 42-43). Respondent had already given his version of the occurrence in a sworn statement made during the pre-trial investigation (R. Vol. II, 35-36). In a vital respect, this story was contradicted in the pre-trial statement of both eye witnesses, the German girl and the surviving Polish guard. Respondent claimed, as he did at the trial, that one of the Poles made advances to the girl, that respondent asked the Poles to leave, and that one of them struck him on the lip (R. Vol. II, 35). The girl, however, making no mention of anyone touching her, stated, "They [the Polish guards] said to me: 'Hello Miss'. Brown got mad and holding in his left hand a pistol and in his right one a rifle he walked toward the Poles and hollered in German: 'Raus' which they did" (R. Vol. II, 31). This was substantially the statement of the surviving Polish guard who said further, that when he and his companion were outside the guardhouse, he said to respondent, "It is OK boy", whereupon respondent fired the shot that struck the deceased (R. Vol. II, 33). This was in flat contradiction to respondent's claim that deceased had attacked him with a bottle.

Against these facts it is difficult to see what alleged acts or omissions of defense counsel would have been avoided by the dictates of competence.

We think that this case demonstrates the desirability of avoiding, on habeas corpus, an evaluation of the competence of members of a court

martial—a task which, at best, is fraught with difficulty and delicacy.

C. *The pretrial investigation.*—The court below rejected the district court's determination that the "70th Article of War was substantially complied with in the pretrial investigation as was also the 43rd Article of War" and "the other grounds for habeas corpus alleged are without merit." (R. 54.) The majority of the Court of Appeals said: "although in the latter case [*Humphrey v. Smith*, 336 U. S. 695] the Supreme Court held that the pretrial investigation under Article of War 70 is not a jurisdictional requirement, the entire absence of any investigation whatever upon a charge of murder is still a circumstance to be considered in determining whether there has been a denial of due process" (R. 70, footnote 4). Wholly apart from the ruling of *Humphrey v. Smith* that the failure to conduct any pretrial investigation would not affect the validity of the judgment of the court-martial so far as habeas corpus courts are concerned, the fact is that in the case at bar an adequate pretrial investigation was actually made. The court below has seized upon the fact that the investigation was initiated upon a charge of violation of the 93rd Article of War and that, after the investigation, the charge was changed to a violation of the 92nd Article of War. But the specifications of the charge were at all times to the effect that the accused "with malice aforethought, willfully,

deliberately, feloniously, unlawfully, and with premeditation" killed the deceased (R. Vol. II, 21). And the facts supporting both the charges of violating the 92nd and the 93rd Articles of War were identical. What the majority of the Court of Appeals held to have been error was the failure to interview the same witnesses and elicit precisely the same facts upon the new charge as were obtained from those witnesses in the investigation already made.

Thus, AW 70 the intent of which is to determine whether in fact a trial is necessary (see 1928 Manual for Courts-Martial, Section 35, page 24; see also Petitioner's Brief in *Humphrey v. Smith*, Oct. Term 1948, No. 457, pp. 30-37) has been distorted by the majority below into a ceremonial rite requiring formal and mechanical adherence irrespective of the fact that such adherence could serve no useful purpose since no further investigation was required to determine whether and on what charges the accused should be tried.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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JANUARY 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I. THE GOVERNMENT HAS BORNE ITS BURDEN OF SHOWING COMPLIANCE WITH AW 8

In his brief (pp. 15-29), the respondent relies heavily on the proposition, put succinctly by the court below (R. 68), that "There is no presumption in favor of the validity of a judgment or sentence of a court martial, and the burden of proving that it was legally organized, that it had jurisdiction, and that all statutory requirements governing its proceedings were complied with, rests upon the party seeking to uphold its judg-

ments.”¹ The respondent insists that the Government, relying on a presumption of validity, has not met this burden.

The Government accepts the statement of the court below, quoted above, as an accurate restatement of the language of this Court in some of the earlier cases which are cited to support it, while noting that the language takes no account of the general presumption of the regularity of official action.¹ The Government denies, however, that it has failed to carry the burden of showing compliance with AW 8.

The difference between respondent and the Government is not, in this respect, a factual one; it is, rather, a difference as to what are the requirements of AW 8 compliance with which must be shown. As we have sought to demonstrate in our principal brief, AW 8 does not require the Government to show, in a habeas corpus proceeding, that a JAG officer was not available for the purpose of serving as law member. That question, under AW 8, is left to the appointing authority for decision. “The commanding officer who convenes the court must decide what membership will be least to the ‘injury of the service’ and what officers are ‘available’.” *Henry v.*

¹ “It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown.” *Lewis v. United States*, 279 U. S. 63, 73, and cases cited. Compare *Wade v. Hunter*, 336 U. S. 684, 692.

Hodgès, 171 F. 2d 401, 403 (C. A. 2), certiorari denied, 336 U. S. 968. His decision, like that involved in *Martin v. Mott*, 12 Wheat. 19, 35, "being in a matter submitted to his sound discretion, must be conclusive."

This is not a case like *Runkle v. United States*, 122 U. S. 543, in which the statute (AW 65) required confirmation of the court martial proceedings by the President and it was not shown that the President had, in fact, approved or confirmed. Here, the record plainly shows that the court was detailed "by command of Brigadier General Bresnahan", the appointing authority (R: Vol. II, 53-54). Nor is this a case like *McClaghry v. Deming*, 186 U. S. 49, 63-64, in which the court was made up "of members each and all of whom were prohibited by law from sitting on such court." The essential difference between the case at bar and those cited is that the Articles involved in those cases imposed absolute requirements and left no room for an exercise of judgment; the Article here involved, however, plainly commits to the appointing authority a discretionary, "on the spot", power to strike "a balance between the conflicting demands upon the service". *Henry v. Hodges*, 171 F. 2d 401, 403 (C. A. 2), certiorari denied, 336 U. S. 968.² In such a

² The new AW 8 (see principal brief, pp. 24-25, note 8) takes from the appointing authority this discretionary authority and substitutes an absolute requirement that the law member be a JAG officer or "an officer who is a member of

case, "the courts must assume—nothing to the contrary appearing upon the face of the order convening the court—that the discretion conferred upon [the appointing authority] was properly exercised." *Mullan v. United States*, 140 U. S. 240, 245.

II. THE CONCURRENCE OF TWO-THIRDS OF THE MEMBERS OF THE COURT-MARTIAL PRESENT WAS SUFFICIENT FOR RESPONDENT'S CONVICTION

At pages 48–50 of his main brief in this Court, respondent renews a contention made in both of the lower courts (see R. 7, 14, 59), which, if sound, would indicate that the court martial may have exceeded its statutory powers in finding him guilty of murder under AW 92 (10 U. S. C. 1564), but which was not relied on by either of those courts in their determination that his conviction is invalid. The district court expressly held the contention to be without merit (R. 51, 54) and the Court of Appeals found it "unnecessary to pass upon" it (R. 71). Since, if the contention were sound, it would constitute a basis for supporting the lower courts' judgments, though different from any relied upon by those courts, it is available to respondent in this Court, though he filed no cross-petition for cer-

the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail".

tiorari.³ We submit, however, that there is no merit in the contention.

Respondent's arguments is that under AW 43 (10 U. S. C. 1514) three-fourths of the members of the court martial are required to concur in a finding of guilty of murder for such a finding to be valid, and that here the court martial record indicates that "two-thirds of the members" concurred in this finding (R. Vol. II, 96). It is not disputed, however, that *three-fourths* of the members of the court concurred in the *sentencing* of respondent to life imprisonment (see R. Vol. II, 97), the mandatory minimum punishment for murder prescribed by AW 92 (10 U. S. C. 1564).⁴ The insubstantiality of respondent's contention appears, we think, from the plain terms of AW 43. It provided, at all times relevant hereto, as follows:⁵

No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the

³ See *Nye & Nissen v. United States*, 336 U. S. 613, 616, 618-620; *Walling v. General Industries Co.*, 330 U. S. 545, 547; *United States v. Ballard*, 322 U. S. 78, 88; *Le Tulle v. Scofield*, 308 U. S. 415, 421-422; *Commission v. Havemeyer*, 296 U. S. 506, 509; *Langnes v. Green*, 282 U. S. 531, 535-539.

⁴ AW 92 provides: "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; * * *"

⁵ AW 43 has been since amended in a significant respect, clarifying in nature, which gives added support to our position. See *infra*.

vote is taken, and for an offense in these articles expressly made punishable by death; *nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote. [Italics supplied.]*

Respondent argues that, though the above article "is peculiarly drawn," "[t]he true intention of Congress * * * is to require a three-fourths vote [for conviction] in any case where sentence of life imprisonment is a mandatory minimum" (Br. 50). But this argument perverts the plain terms of the article. The pattern it establishes with reference to the minimum permissible percentage participation by court martial members in court action relating to convicting and sentencing is clear. In order for the court to *convict* a person of an offense for which the death penalty is made mandatory by law,* or to *sentence* a person to death for an offense for which death is a permissible though not mandatory penalty,

* Spying in time of war is the only such offense. AW 82 (10 U. S. C. 1554.)

* E. G. (in addition to murder and rape (AW 92)), desertion in time of war (AW 58, 10 U. S. C. 1530), mutiny or sedition (AW 66, 10 U. S. C. 1538), misbehavior before the enemy

the decision must be unanimous. For the court to *sentence* a person to life imprisonment or to imprisonment for more than ten years, the decision must be concurred in by at least three-fourths of the court. But *all other convictions and sentences* may be determined by a two-thirds vote of the members of the court; that is to say, to *convict* of any offense other than the single type of offense previously specified (to wit, where death is the mandatory penalty imposed by law), or to *sentence* to ten years' imprisonment or less, a two-thirds vote suffices.

If the above interpretation of AW 43 as it read at the time of respondent's trial, conviction, and sentence was ever doubtful, the doubt has been eliminated by the amendment of that Article by § 220 of the Act of June 24, 1948, c. 625, 62 Stat. 633.* This section amended AW 43 as it formerly read (and as set out *supra*) by substituting for the words "All other convictions and sentences" in the second sentence thereof, the words—

Conviction of any offense for which the death sentence is not mandatory and any

(AW 75, 10 U. S. C. 1547), etc. It is only in the cases of murder and rape that the sole alternative sentence to the death penalty is life imprisonment. In all other cases where death is a permissible penalty, the offender may be sentenced to "death or such other punishment as a court martial may direct."

* Effective as of February 1, 1949. See § 244 of the Act referred to, 62 Stat. 642.

sentence to confinement not in excess of ten years * * *.

The substituted words thus embody explicitly what was formerly implicitly contained within the concept "All other convictions and sentences." The legislative history of the amendment, moreover, makes it entirely clear that the change was designed merely to clarify the meaning of the Article as it formerly stood.*

Clearly, therefore, since respondent's offense, murder, does not carry the mandatory penalty of death, no more than two-thirds of the court were required to concur in the finding of guilty, though three-fourths were required to (and did) concur in the sentence to life imprisonment, just as all the members would have been required to

* See H. Rep. 1034, pp. 12, 18, 80th Cong., 1st sess., accompanying H. R. 2575 (the bill H. R. 2575 was never enacted, but its substance was incorporated as title II of S. 2655, 80th Cong., 2d sess., which became the Act of June 24, 1948, *supra*: See H. Rep. 2438 [Conference Report], p. 51, 80th Cong., 2d sess., accompanying S. 2655); see also the statement of Brigadier General Hoover, Assistant Judge Advocate General, as to the purpose of the proposed amendment of AW 43, in his appearance before the House Committee on Armed Services, Subcommittee No. 11, Legal (No. 125, *Subcommittee Hearings on H. R. 2575, to Amend the Articles of War, &c., April 14, 1947*, pp. 2055-2056). "The changes that are now proposed in the article [AW 43]," said General Hoover (p. 2056), "are intended to clarify the wording of the article, but not to change the sense of it. The result will be that we will be able to convict a man of murder by a two-thirds vote, but if we want to sentence him to death there must be a unanimous vote" [*italics supplied*].

concur in a sentence of death. See *Anderson v. Hunter*, 177 F. 2d 770, 771 (C. A. 10).

It might be supposed, it is true—and this appears to be the consideration which gives rise to respondent's present contention—that it is somewhat inconsistent for Congress, on the one hand, to require only two-thirds of the members of the court martial to concur in a *conviction* of an offense for which the *mandatory minimum* penalty is life imprisonment, and yet, on the other hand, to require three-fourths of the court to concur in the imposition of that mandatory minimum sentence.¹⁰ But we think the inconsistency is only apparent, and not real. The true meaning of AW 43 is this: A conviction of murder may be had by a two-thirds vote. The mandatory minimum penalty imposable for this offense is life imprisonment (AW 92), but nevertheless, under AW 43, at least three-fourths of the membership of the court martial must concur in the decision to impose this sentence in order for it to ~~be~~ valid."

¹⁰ Cf *Stout v. Hancock*, 146 F. 2d 741, 744 (C. A. 4), certiorari denied, 325 U. S. 850, where the court, though the issue there involved was different from that at bar (the issue there being whether the words "and for an offense in these articles expressly made punishable by death," in the first sentence of AW 43, required that a sentence to life imprisonment for rape be *unanimously* concurred in by the members of the court martial), adverted to the "apparent inconsistency" in AW 43 to which we are now referring.

¹¹ It is to be noted that "Voting [as to the sentence to be imposed] * * * is obligatory on each member regardless of his vote as to the findings. It is the duty of each mem-

If a three-fourths vote cannot be attained, there is only one alternative open to the court—to revoke its finding of guilty of murder and find the accused either not guilty or guilty of a lesser included offense.

This is the administrative interpretation of AW 43. The *Manual for Courts-Martial*, 1949 ed., par. 80b, provides in pertinent part:

* * * The concurrence of all members present at the time a vote is taken is required to adjudge the death penalty; three-fourths of the members present at the time the vote is taken must concur to adjudge a sentence to life imprisonment and to confinement for more than 10 years, and the concurrence of two-thirds of the members present at the time the vote is taken is required to adjudge any other sentence (A. W. 43). * * * Any sentence, even in a case where the punishment is mandatory, must have the concurrence of the required number of members. If a general court martial, after finding an accused guilty of an offense for which a mandatory punishment is prescribed by the Articles of War, shall find upon a ballot being taken upon the question of imposition of such mandatory sentence that the number of votes required by Article 43 for

ber to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused. * * * (MCM, 1928 ed., par. 80b; *id.*, 1949 ed.)

the imposition of such sentence have not been cast in its favor, then a second ballot shall be taken upon the same question. If upon such second ballot the requisite number of votes for the imposition of such sentence is still lacking, the court will reconsider its findings in the case and may revoke its former findings and find the accused not guilty, or guilty of a lesser included offense. [Italics supplied.]

This sensible construction of AW 43 and AW 92, read in conjunction with each other as they must be, by the executive department charged with their administration, is entitled, under repeated decisions of this Court, to great weight in their construction by the courts. It fully resolves, in a manner entirely fair to the accused, the latent ambiguity in the two Articles. It is, moreover, in harmony with the decision of this Court in *Andres v. United States*, 333 U. S. 740, 746-749, involving a comparable ambiguity in the federal statutes relating to the power of a jury to return a qualified verdict of guilty of first-degree murder.

III. THIS COURT SHOULD FIND COMPLIANCE WITH AW 8 IN THIS CASE EVEN THOUGH THE JUDGMENT OF THE COURT BELOW MAY BE REVERSIBLE ON OTHER GROUNDS

Several very recent decisions of the lower federal courts announce a rule which would permit of the temporary disposition of this case on the

ground that respondent's application for a writ of habeas corpus is premature in that he has failed to exhaust his administrative remedies."

In these cases, the courts have held that Article 53 of the amended Articles of War (Act of June 24, 1948, c. 625, Sec. 230, 62 Stat. 639, effective February 1, 1949) which authorizes the Judge Advocate General, upon good cause shown, to grant a new trial or other relief to a person convicted by court martial, affords an administrative remedy which, except possibly in extraordinary cases, must be exhausted before habeas corpus will lie. See also *Manual for Courts-Martial, U. S. Army*, 1949, c. XXII. This rule has been applied even when, as here, the original court martial judgment had been approved by the Judge Advocate General on the original review (R. Vol. II, 6-7). And the rule has been invoked to dispose of more than 35 of the approximately 60 cases similar to that at bar, to which reference was made in the petition for a writ of certiorari in this case, p. 12.

Despite the possible availability of this ground for reversal of the judgment below, the Government urges this Court to correct what we believe

¹¹ See, e. g., *Whelchel v. McDonald*, 176 F. 2d 260, 262-263 (C. A. 5); *Spencer v. Hunter*, 177 F. 2d 370 (C. A. 10); *McMahan v. Hunter*, C. A. 10, No. 3975, November Term, 1949; *Massey v. Humphrey*, 85 F. Supp. 534 (M. D. Pa.); *Sinclair v. Hiatt*, 86 F. Supp. 828 (N. D. Ga.).

to have been the substantive errors committed by the court below. There is no reason to anticipate that, on applications filed with him under AW 53, the Judge Advocate General would reverse the course of military decisions as to the meaning of AW 8 referred to in our principal brief (pp. 27-31), and reject the views of the Court of Appeals for the Second Circuit as announced in *Henry v. Hodges*, 171 F. 2d 401, certiorari denied, 336 U. S. 968. Consequently, dismissal of respondent's petition on grounds of prematurity would be most likely to accomplish no more than a postponement of this and the many other cases involving AW 8, rather than a genuine disposition of them.

When, as here, there is an existing conflict among the circuits on the question, the Government is of the view that this Court should resolve that conflict even though the question on which it arises might temporarily be avoided. Even in a case involving an important constitutional question, this Court, through Mr. Justice Holmes, has said, "The general question to which we have adverted must be decided, if not in this then in the next case, and it should be disposed of now." *Block v. Hirsh*, 256 U. S. 135, 156-157; see also *Penna. Coal Co. v. Mahon*, 260 U. S. 393, 414.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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FEBRUARY 1950.

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Court of Appeals: 175 Federal 2d 273.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

SPECIAL APPEARANCE AND BRIEF OF EUGENE PRESTON BROWN CONTESTING JURISDICTION.

I

DEFECTS OF PROCEDURE

The judgment of the Court of Appeals was entered June 16. The time for filing a petition for certiorari expired September 14, except that an order of extension appears to have been granted September 13.

The application for the September 13 order of extension was ex parte. No notice was given prior to the mailing of a letter from Washington October 7. No reason or explanation was ever given why the extension was sought.

These defects are jurisdictional.

(1)

Furthermore, tacit approval of such procedure will be withheld if certiorari is denied.

Pages 143 to 145 of the Court of Appeals record have not been served on me. I do not know and have never known what is contained in those pages.

II

ABSENCE OF JURISDICTION OVER SUBJECT-MATTER

The Supreme Court has no jurisdiction to grant certiorari in a habeas corpus case from a judgment of a Court of Appeals of the United States that orders the discharge of a prisoner, or affirms an order of discharge granted by a District Court.

(It is assumed that an order refusing or granting certiorari is not necessarily based upon a ruling upon this issue.)

In England the custodian in a habeas corpus case cannot appeal, according to the House of Lords, which regards this as fundamental.

COX v. HAKES (1890) L.R. 15 App. Cas. 506,
17 Cox, C.C. 158, 60 L.J.Q.B.N.S. 89,
63 L.T.N.S. 392, 39 Week Rep. 145,
54 J.P. 820.

To the same effect:

REX v. THORNTON (1915) 9 Alberta L.R. 163,
30 D.L.R. 441, 26 Can. Crim. Cas. 120,
34 West L. Rep. 178.

RE TIDERINGTON (1912) 17 B. C. 81, 5 D.L.R. 138.

RE BLAIR (1891) 23 N.S. 225.

See LONDON'S CASE (1609) 8 Coke, 121 b,
72 Eng. Reprint 658.

Unless the statute provides for appeal, there is no appellate jurisdiction.

CARPER v. FITZGERALD, 121 U.S. 87.

Section 2253 of Title 28 of the New Judicial Code provides for appeal only as far as the Court of Appeals. That decides the point. There is no jurisdiction in this court. Section 463(c) of the old Title 28 was not carried over into Section 2253 of the new Title 28. Supreme Court Rule 45 related to the old Section 463(c).

If it be argued that Section 1254 affords a remedy, the argument is unsound because the particular statute relating to habeas corpus is 18 USCA 2253.

Under the House of Lords decision of COX v. HAKES, *supra*, the nature of habeas corpus excludes appeal where release has been ordered. Habeas corpus as thus defined is the remedy protected by the United States Constitution, Article I, Section 9. Suspension of the writ by allowing appeals is as bad as suspension by delaying the writ while the court is in vacation, and that is clearly forbidden by the Habeas Corpus Act of 1691 and therefore by the Constitution.

The great weight of authority in this country is that a decision in a habeas corpus case in favor of the prisoner cannot be appealed. Jurisdiction is lacking in the appellate court.

STATE v. TOWERY, 143 Ala. 48, 39 Sou. 309
(1904).

RE ZANY, 164 Calif. 724, 130 Pac. 710 (1913).

See MARTIN v. DISTRICT COURT, 37 Colo. 110,
119 Am. St. Rep. 262, 86 Pac. 82 (1906).

RE TAYLOR, 3 McArth. 426 (1879).

GAGNET v. REESE, 20 Fla. 438 (1884).

HAMMOND v. PEOPLE, 32 Ill. 446, 83 Am. Dec.
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WALLACE v. CLEARY, 5 Ill. App. 384 (1879).

MAGERSTADT v. PEOPLE, 105 Ill. App. 316
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SKINNER v. SEDGBEER, 8 Kan. App. 624, 56
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RE COSTON, 23 Md. 271 (1865).

PEOPLE v. COVANT, 59 Mich. 565, 26 N.W.
768 (1886).

PEOPLE v. FAIRMAN, 59 Mich. 568, 26 N.W.
769 (1886).

EX PARTE JILZ, 64 Mo. 205, 27 Am. Rep. 218,
2 Am. Crim. Rep. 217 (1876).

RE WHICKER, 187 Mo. App. 96, 173 S.W. 38
(1915).

See STATE v. SIMMONS, 112 Mo. App. 535,
87 S. W. 35 (1905).

EUREKA COUNTY BANK HABEAS CORPUS
CASE, 35 Nev. 80, 126 Pac. 655, 129 Pac.
308 (1912).

NOTESTINE v. ROGERS, 18 N.M. 462, 138 Pac.
207 (1914).

RE QUINN, 2 App. Div. 103, 37 N.Y.S. 534,
152 N.Y. 89, 46 N.E. 175 (1897).

WALTON v. GATLIN, 60 N.C. (1 Winst. L) 318
(1864).

STATE v. MILLER, 97 N.C. 451, 1 S.E. 776 (1887).

RE WILLIAMS, 149 N.C. 436, 22 LRA (NS) 238,
63 S.E. 108 (1908).

EX PARTE JOHNSON, 1 Okla. Cr. 414, 98 Pac.
461 (1908).

VANVABRY v. STATON, 88 Tenn. 334, 12 S.W.
786 (1889).

MEAD v. METCALF, 7 Utah 103, 25 Pac. 729
(1891).

RÉ BARBER, 56 Vt. 1 (1884).

As a matter of statutory interpretation, and as a matter of constitutional law, and according to the great weight of American authority, this court has no jurisdiction of this case.

The financial burden upon a person wrongfully imprisoned becomes oppressive if he must run the procedural gauntlet to the highest court and become a guinea pig for the convenience of other prisoners and the departments of

government. The orthodox British and American rule, partially restored by 28 USCA 2253, is sound.

(Note: Corrections in regard to statement of the case are in Appendix.)

- Respectfully submitted,

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 Atlanta 3, Georgia.
 Attorney for
 Eugene Preston Brown
 Appearing specially,
 not admitting jurisdiction
 but contesting it.

CERTIFICATE OF SERVICE

I, Walter G. Cooper, certify that I have mailed five copies of the foregoing special appearance and brief to Philip B. Perlman, Esquire, The Solicitor General, Department of Justice, Washington, District of Columbia, in an envelope duly stamped and sealed, this the day of November, 1949.

Attorney for Eugene Preston Brown

APPENDIX

CORRECTIONS TO STATEMENT OF THE CASE

Petition for certiorari, page 2, lines 6-12: The appointing authority did not purport to determine whether an officer of the Judge Advocate General's Department was available for the purpose of serving as Law Member. Instead, he totally disregarded this point and the requirement of the 8th Article of War. (Court of Appeals record 108, 137.)

Petition for certiorari, page 2, lines 13-17: The errors and irregularities constituted a denial of due process.

Petition for certiorari, page 4: The prisoner also alleged (1) Due process was denied, in various particulars. (2) There was no scintilla of evidence of malice or premeditation. (3) Reviews were insufficient to comply with the indispensable requirements of the statute. (CA record 4-16.)

Petition for certiorari, page 5, lines 19-26: Captain Chalkley could not have been excused from duties as Law Member, for his duties were not those of Law Member but of Assistant Trial Judge Advocate. This also applies to petition for certiorari, page 10, footnote 4.

Petition for certiorari, page 6, footnote 3: We never contended that Captain Royston was an officer of the Judge Advocate General's Department. The officers who were members of that Department and were available were

Captain Chalkley and Captain Sams. (Transcript in this court, page 22).

Petition for certiorari, page 8, lines 6-15: The appointing authority did not purport to exercise a discretion but totally disregarded the requirement of the 8th Article of War. Terming the decisions below a review is confusing. The errors and irregularities constituted a denial of due process which ousted jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

*On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit*

OPINIONS BELOW

The opinion of the Court of Appeals (R. 67-70) is reported at 175 F. 2d 273. The opinion of the District Court (R. 51-54) is reported at 81 F. Supp. 647.

JURISDICTION

The petitioner invoked Section 1254 (1).

Jurisdiction is absent because the Supreme Court has no jurisdiction in a habeas corpus case to review a judgment of a Court of Appeals that orders the discharge of a prisoner, or affirms an order of discharge granted by a District Court.

The authorities and argument are set forth in the argument in this brief.

STATEMENT OF THE CASE CONSISTING OF CORRECTIONS TO PETITIONER'S STATEMENT

Warden's brief, page 3:

The German girl was believed by Brown to be of good character and reputation. (R. 1, paragraph 8, R. 10, paragraphs 8, 9, 10.)

Warden's brief, page 3:

Prosecution witness Elisabeth Rehm testified that before Olschewski and Kowalsczyk left the guard box, they had an argument with Brown, apparently including a verbal threat (R. Vol. II, 68, lines 3-10, 17-20 and 38-41). She did not understand what was said in the argument. She did not state how it arose. She did not see the shot fired. The accused testified that the argument arose when they molested the girl (R. Vol. II, 81). According to her, they spoke to her in German, using an expression translated "Hello, Miss" (a phrase with a ring of familiarity). In German they used the phrase "Gruess Gott" (R. Vol. II, 31), which, to an American unfamiliar with German language, sounds the opposite of a respectful greeting.

The statement of the Warden's brief, page 3, that Olschewski and Kowalsczyk left the house is confusing. They walked to the door, and stopped (R. I, 82). In failing to move on they challenged the sentry's authority. The Warden's assertion that accused "followed" them to the door is confusing. It was after they had stopped and turned and remained that he went to the door (R. II, 82). In firing the shot, Brown intended to frighten deceased (R. II, 84). When Olschewski was asked in which direction the gun was pointed, up in the air, down at the floor, backwards, forwards, or what, he was not sure. But he did testify that Brown had the pistol in his hand in the direction between

Olschewski and Kowalsczyk, and he demonstrated by holding the pistol in his hand, extending his hand from the body parallel with the ground and extended directly forward (R. II, 60). The autopsy report (R. II, 36) showed that the course of the bullet was from just to the right of and below the tip of the scapula (shoulder blade) to the left upper quadrant of the abdomen (which would mean a course 30 degrees downward), showing that the deceased was lunging forward swinging at Brown. Brown was very small, 5 feet, 7½ inches tall, 39 years old, his weight with clothing 135 pounds (R. page 2, par. 12, R. 10, par. 12). Olschewski and Kowalsczyk were in their twenties and much larger (R. 47). The autopsy report was not introduced in evidence (R. II, 76). No one evaluated it correctly in the pretrial examination. The medical stipulation (R. II, 76) at the trial was far less favorable to the accused, when taken in connection with the testimony that the bullet entered the back of the shoulder (R. II, 74).

After the shot, Brown immediately sought a flashlight to help the wounded man (R. II, 35), and helped carry him in. (R. II, 70.) A single shot was fired. (R. II, 35.)

Olschewski was impeached by proof that he made a contradictory statement of importance in his written statement after the incident. His explanation that the written statement was garbled was in no way confirmed by any evidence (R. II, 62).

Warden's brief 3:

The statement that the first paragraph on page 3 of Warden's brief is uncontradicted is denied. The facts set forth above in this brief are to the contrary.

Warden's brief 3:

On 27 December 1946 the company commander recommended to his battalion commander a trial upon a charge

of manslaughter (R. II, 30). To this recommendation he attached the autopsy report and brief statements from witnesses. Who took them is not shown. The statement in German by the principal witness, Olschewski, was incorrectly recorded, according to Olschewski (R. II, 62). The method of abbreviating the date is European, 7.12.1914 (R. II, 34), hence the interviewer must not have been American.

After the company commander recommended trial as above stated, by a first endorsement the battalion commander appointed an investigating officer (R. II, 29). The investigation consisted merely of an interview with accused (R. II, 27, 28). The investigating officer did not tell the accused of his right to interview witnesses against him (R. 41). Accused was not at that time represented by counsel (R. 40). The investigation report was erroneously prepared, containing inconsistent paragraphs 2 and 3 thereof (R. II, 27). By a second endorsement, this report was transmitted to battalion headquarters (R. II, 29). Recommendation was trial by general court-martial. Murder was not mentioned.

On Saturday, 28 December, the group commander similarly recommended general court-martial, not mentioning murder. On Monday, 30 December, at Headquarters of the Continental Base Section over 100 miles away, the charge and specification of manslaughter was marked out with pen and ink, and these changes bore the initials "R.E.B." The marked out specification appears to have been unintentionally omitted from page 21 of Volume II of the Record. It reads:

"REB

Charge 1: Violation of the 93 Article of War.

REB

Specification: In that Technician Fifth Grade Eugene P. Brown, 994th Ordinance HAM Company, did, at Feuerbach, Germany, on or about 25 December 1946 willfully, feloniously, and unlawfully kill Josef Kowalsczyk, a Polish Civilian, by shooting him in the right shoulder with a .45 Caliber Pistol.

REB

Charge: Violation of the 92nd Article of War.

REB

Specifications: In that Technician Fifth Grade Eugene P. Brown, 994th Ordinance HAM Company, did, at Fuerbach, Germany, on or about 25 December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Josef Kowalsczyk, a human being, by shooting him with a pistol."

This occurrence was admitted in the Warden's return (R. 1, par. 26; R. 11, par. 26). Also pages 42 and 43 of Warden's brief need to be corrected in this particular.)

Captain Robert E. Byrne, JAGD, on that day at Continental Base Section Headquarters swore to a new charge of violation of Article of War 92 and a new specification of murder, taking oath that he had investigated. Accused never heard of any such investigation (R. 45). Presumably Captain Byrne referred to a reading of the papers as an investigation. No additional investigation occurred thereafter (R. 3, 4, 5, paragraphs 18-28, 30, R. 10, 11, 12, paragraphs 18-28, 30). The oath of Captain Byrne was taken before Captain Gerald A. Sams, JAGD (R. II, 22), who performed no other function in the case (R. 45), but who signed as Assistant Trial Judge Advocate, C.B.S.

The pretrial investigation that was previously conducted was a travesty. The errors are listed in paragraphs 31 to

49 of the habeas corpus petition appearing on pages 5 and 6 of the Record, and subsequently in this brief.

Brown had only attended high school one year. (R. 49.)

Warden's brief, page 4:

Neither of the two assistant defense counsel participated, nor did assistant trial judge advocate, Captain Jack H. Chalkley, Judge Advocate General's Department, participate.

Warden's brief, page 4, footnote 1:

Long before the question of the law member was added by amendment, the habeas corpus petition in paragraph 52C (R. 6) alleged, "Two able lawyers, members of the Judge Advocate General's Department, represented the prosecution." This referred to Captain Kane of the Medical Administrative Corps and Captain Royston of the Adjutant General's Department. The error was discovered when the Warden's return was filed (R. 13, paragraph 52C). The error was immediately corrected (R. 16, paragraph 1 (a)). That was over two weeks before the trial in the District Court. That error has not been repeated.

Before the Court of Appeals, Brown's reply brief contained this statement:

"In addition to Captain Chalkley, (JAGD), there was also available Captain Gerald A. Sams, (JAGD), who witnessed a paper at Headquarters on the very day when this case was referred to the court-martial."

Oral argument for Brown before the Court of Appeals was to the same effect as the reply brief.

The Court of Appeals must have been interested principally in the important facts that Captain Sams was an officer of the Judge Advocate General's Department and was available to be law member, and only secondarily in

whether he was appointed assistant trial judge advocate. Indeed, he signed his name in witnessing the paper above the following typing:

"GERALD A. SAMS

Captain, JAGD, Asst. Trial Judge Advocate, CBS"

The difference between this title and the reference to him in the opinion is "CBS" and the fact that the opinion refers to an appointment of him as assistant trial judge advocate as being in the order appointing the court-martial. In fact the signature of Captain Sams immediately proceeds the order referring the case to this general court-martial for trial, and since that order is a "first indorsement," it may be that Captain Sams in fact is included in the four corners of the order, if the order incorporates by indorsement the specification of murder.

Whether the Court of Appeals meant Captain Sams or anyone else, the Supreme Court may properly decide that Captain Sams was available to be law member.

Warden's brief, page 4:

Captain Chalkley was excused not from serving as law member but as assistant trial judge advocate. The selection of law member had occurred December 7 (R. II, 53). The order of reference for trial was issued 30 December (R. II, 3). Trial occurred January 7 and 14 (R. II, 54, 91.)

Warden's brief, page 5:

The "introduction" of defense counsel to the court by the accused was a printed recital in the form. Counsel was no doubt far better known to the court than accused.

Warden's brief, page 5:

Olschewski and Kowalsczyk "left" only in that they walked to the door. There they stopped, turned around

and stood fast. This was a disobedience of the order to "raus" (get out) and was a defiant attitude toward a sentry. They should have moved on. When they did not, Brown located a pistol and went to the door (R. II, 82). He could not countenance defiance at his post.

Warden's brief, page 6:

Olschewski in his pretrial statement in German is quoted with the direct quotation in English of what he said just before the shot was fired: "Boy is OK" (R. II, 34). The translation of the statement from German into English should of course have carried this direct quotation verbatim. Instead, it was changed to "It is OK boy" (R. II, 33). The first version was an apology for the misconduct of the "boy," Kowalsczyk. The second version was purported submission to the order to leave. Kowalsczyk was a boy in his twenties. Accused was a middle-aged man, 39, and a non-commissioned officer. This change in this res gestae statement gave it just the opposite significance. This change was not noticed in the pretrial investigation, or by defense counsel. It was never mentioned to the court. It was not noticed in any review. While the testimony of Olschewski at the trial followed the second version, he was not questioned about the first version. Such a mistake in a statement of a witness can easily, without any intention on the part of the witness or the attorney, result in mistaken testimony. Memory of conversation is notoriously unreliable. First impression is best.

Warden's brief, page 6:

Elisabeth Rehm testified to an agreement preceding the shooting (R. II, 68, lines 3-10, 17-20 and 38-41).

Warden's brief, page 8:

The prisoner also alleged (1) Due process was denied, in various particulars. (2) There was no scintilla of evi-

dence of malice or premeditation. (3) Reviews were insufficient to comply with the indispensable requirements of the statute. (4) No evidence of murder. Insufficient evidence of manslaughter. (R. I, 7-8, 17-18, 22-23.)

Warden's brief, page 9:

The Court of Appeals found that the record evidence established that two officers of the Judge Advocate General's Department were available for appointment as law member. It held, as did the District Court, that the burden of proof in regard to availability was upon the Warden (R. 53, 68).

Warden's brief, page 9:

The Court of Appeals found the court-martial record replete with highly prejudicial errors and irregularities denying due process. The six listed were only a few of those found (R. 70). Their effect was also cumulative.

CORRECTIONS TO VOLUME II OF RECORD

The correction on page 21 is ~~above~~ stated.

The exhibit that is a Manual of Interior Guard Duty is on file with the Clerk of the Supreme Court.

The extract copy of Guard Report for 25 and 26 December 1946 is an accurate printing of the copy in the record, but the record copy should have been the extract for the evening hours instead of for the morning hours.

SUMMARY OF ARGUMENT

I. The Supreme Court's jurisdiction to review a decision of a Court of Appeals granting a discharge of a prisoner exists only by statute. Section 2253 of Title 28 of the New Judicial Code provides for appeal only as far as the Court of Appeals. Reviser's notes confirm this view. Old section 463 (c) is not carried over. New section 1254 is general

and does not include habeas corpus. Reason supports this view: A discharged prisoner cannot afford repeated appeals for government convenience.

II. A court-martial is a tribunal of special and limited jurisdiction. Its sentences are subject to collateral attack. No presumption or inference exists in favor of such a sentence. Every jurisdictional fact must be established by the Warden. The most important member, the law member, must be an officer of the Judge Advocate General's Department, except when such an officer is not available. The burden of proof of availability is on the Warden. He offered no proof. The accused proved by the record itself that two Judge Advocate General's Department Officers were available. The court-martial sentence was void.

There was no evidence that the appointing authority made any determination in regard to availability. In fact he made no determination whatever on the subject.

The statutory exception in regard to availability has been magnified by administrative interpretation to the point of absurdity, amounting to nullification of the requirement that the law member shall be an officer of the Judge Advocate General's Department. Aside from that, the question of availability was not even considered by the appointing authority in this court-martial. Jurisdiction cannot be conferred by consent or waiver. Nor was there any consent or waiver here.

Nothing in the legislative history of the 8th Article of War suggests any different view.

III. Due process of law was denied. Therefore the sentence is void. The violations are flagrant and too numerous to list in this summary.

IV. A soldier is entitled to the right of counsel under the Fifth Amendment. This right was not substantially

accorded. The particulars are serious, and are too numerous for listing in this summary.

V. A three-fourths vote is necessary to convict for murder. The minimum sentence for murder is life imprisonment. Conviction automatically carries at least a life sentence. Such a sentence cannot be imposed with less than a three-fourths vote. This is the true meaning of the statute.

ADDITIONAL REASONS URGED

In addition to the reasons given by the Court of Appeals, the following reasons will be urged in support of the order:

1. Conviction for murder requires three-fourths vote, not mere two-thirds.

2. Constitutional right to counsel not substantially complied with. (Partially a duplication of the ground of denial of due process.)

I

THE SUPREME COURT HAS NO JURISDICTION TO REVIEW A JUDGMENT OF THE COURT OF APPEALS THAT ORDERS THE DISCHARGE OF A PRISONER, OR AFFIRMS AN ORDER OF DISCHARGE GRANTED BY THE DISTRICT COURT.

In the absence of statute, the custodian cannot appeal an order of discharge.

Cox v. Hakes, (1890) L.R. 15 App. Cas. 506.

Sec'y of State v. O.B., (1923) A.C. (Eng.) 603.

State v. Towery, 143 Ala. 48 (1904).

Re Zany, 164 Calif. 724 (1913).

Gagnet v. Reese, 20 Fla. 438 (1884).

Hammond v. People, 32 Ill. 446 (1863).

Wallace v. Cleary, 5 Ill. App. 384 (1879).

Magerstadt v. People, 105 Ill. App. 316 (1902).

Skinner v. Sedgbeer, 8 Kan. App. 624 (1899).

Re Coston, 23 Md. 271 (1865).

People v. Covant, 59 Mich. 565 (1886).

People v. Fairman, 59 Mich. 568 (1886).

Ex Parte Jilz, 64 Mo. 205 (1876).

Re Whicker, 187 Mo. App. 96 (1915).

See State v. Simmons, 112 Mo. App. 535 (1905).

Notestine v. Rogers, 18 N.M. 462 (1914).

Re Williams, 149 N.C. 436 (1908).

Re Barber, 56 Vt. (1884).

Carper v. Fitzgerald, 181 U.S. 87 (1887).

In re Neagle, 135 U.S. 1 (1890).

Cross v. Burke, 146 U.S. 82 (1892).

In re Schneider, 148 U.S. 157 (1893).

In re Lennon, 150 U.S. 393 (1893).

McKnight v. James, 155 U.S. 685 (1895).

Lambert v. Barrett, 157 U.S. 697 (1895).

Chin Fong v. Backus, 241 U.S. 1 (1916).

Horn v. Mitchell, 243 U.S. 247 (1917).

Pothier v. Redman, 261 U.S. 307 (1923).

See Craig v. Hecht, 263 U.S. 255 (1923).

United States v. Singer, 5 Fed. 2d 966 (CCA 3-1925).

Section 463 (c) of the Old Title 23 provides:

"Sections 346 and 347 of this title applicable. Sections 346 and 347 of this title shall apply to habeas corpus cases in the circuit courts of appeals and in the Court of Appeals of the District of Columbia as to other cases therein."

Section 347 (a) of the Old Title 28 provided:

"In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme

Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Section 2253 of the New Title 28 provides:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had."

There shall be no right of appeal from such order in a proceeding to test the validity of a warrant of removal issued pursuant to section 3041 of Title 18 or the detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Section 2253 is the particular section referring to habeas corpus.

Section 1254(1) of the New Title 28 provides:

"Court of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The Reviser's Notes with reference to 2253 do not purport to include 463 (c) of Old Title 28.

The Reviser's Notes with reference to 1254 do not purport to include 463 (c) of Old Title 28.

The appellate jurisdiction of the Supreme Court in cases where discharge has been affirmed by a Court of Appeals rests exclusively in 463 (c) of Old Title 28. The omission of 463 (c) of Old Title 28 removes the sole basis of jurisdiction.

General statutes relating to appeal do not include habeas corpus.

Notestine v. Rogers, supra.

Gagnet v. Reese, supra.

Ex parte Zany, supra.

In *Cox v. Hakes, supra*, the statute was S.19 of the Supreme Court of Judicature Act, 1873:

"The Court of Appeals shall have jurisdiction and power to hear and determine appeals from any judgment, or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice."

In *Secretary of State v. O'Brien, supra*, the statute was S.3 of the Appellate Jurisdiction Act, 1876:

"Subject as in this Act mentioned an appeal shall be to the House of Lords from any order or judgment of any of the Courts following; that is to say, (1) Of her Majesty's Court of Appeal in England.

In each case the House of Lords held that a statute of general application in regard to appellate jurisdiction does not include habeas corpus. A holding to the same effect would dispose of the present case.

An additional point is presented. Lord Herschell, in *Cox v. Hakes*, stated:

"If the contention of the respondent is to prevail, that statute has effected a grave constitutional change."

In *Secretary of State v. O'Brien*, Lord Shaw of Dumferline stated:

"There is hardly any great historical occasion on which a Government might not plead its view of the public good and the public convenience as an excuse for a violent deprivation from the subject of those rights in which he is secured by law. In declining jurisdiction in this case, your Lordships are not doing more than affirming a settled principle and declining to permit an invasion of constitutional right."

The essential nature of habeas corpus is thus protected against infringement by expensive appeals.

Constitution of the United States, Art. I, Section 9:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

The financial burden upon a person wrongfully imprisoned becomes oppressive if he must run the procedural gauntlet to the highest court and become a guinea pig for the convenience of other prisoners and the departments of government. The orthodox British and American rule is sound. It follows that the subject-matter is beyond the jurisdiction of the court and the assignments of error cannot be considered.

II

COURT-MARTIAL NOT CONSTITUTED AS REQUIRED BY LAW

(A) COLLATERAL ATTACK ON THE JUDGMENT OF A COURT-MARTIAL.

A court-martial is not a court of record, nor a court of general jurisdiction. Its jurisdiction is special and limited. Its judgments are subject to collateral attack.

Ex parte Watkins, 3 Peters 193 (1830).

Collins v. McDonald, 258 U.S. 416 (1922).

Givens v. Zerbst, 255 U.S. 11 (1921).

Runkle v. U.S., 122 U.S., 543 (1887).

McClaghry v. Deming, 186 U.S. 49 (1902).

Humphrey v. Smith, 336 U.S. 695 (1949).

The quotations from four of these cases are in the opinion of the District Court which appears on pages 52 and 53 of Volume I, Transcript of Record.

In *Humphrey v. Smith*, 336 U.S. 695 (1949) *supra*, the court said:

"It is contended that the court-martial was without jurisdiction to try respondent. If so the court-martial exceeded its lawful authority and can be invalidated despite the limited powers of a court in habeas corpus proceedings."

(B) BURDEN OF PROOF UPON THE WARDEN.

The burden of proof is upon the Warden to establish that the court-martial was legally constituted, that it had jurisdiction, and that all the statutory requirements governing its proceedings were complied with.

McClaghry v. Deming, 186 U.S. 49, 62, 63 (1902).

Runkle v. U.S., 122 U.S. 543, 555 (1887).

Givens v. Zerbst, 255 U.S. 11, 19 (1921).

In *Van Mehren v. Sirmeyer*, 36 Fed. 2d 876, 880 (1929), the court held:

"The burden is upon the party asserting the validity of the judgment of the court-martial to prove the existence of the necessary jurisdictional facts."

(C) NO PRESUMPTION OR INFERENCE IN FAVOR OF JUDGMENT OR SENTENCE OF A COURT-MARTIAL.

In *Schuta v. King*, 133 Fed. 2d 283, 287 (CCA 8-1943), the court stated:

"The judgment did not carry with it the presumptions of legality and validity which protect the judgment of a civil court of general jurisdiction against collateral attack."

In *McClaghry v. Deming*, 186 U.S. 49 (1902), at page 63:

"There are no presumptions in its favor, so far as these matters are concerned. . . . The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively, and it is not enough that they may be inferred argumentatively."

In *Runkle v. U.S.*, 128 U.S. 543, at page 556:

"There are no presumptions in its favor so far as these matters are concerned. . . . The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively."

THE COURT-MARTIAL WAS NOT CONSTITUTED AS REQUIRED BY LAW. THE MOST IMPORTANT MEMBER, THE LAW MEMBER, WAS NOT AN OFFICER OF THE JAGD. NO OFFICER OF THE JAGD WAS ON THE COURT.

At the time of this court-martial, the 8th Article of War (10 USCA 1479) provided:

"The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer

of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe." (Act of June 4, 1920, Chapter 227.)

This provision was enacted in 1920 as a reform measure resulting from experience of World War I.

For legal purposes, the law member is the most important member of a court-martial.

The law member corresponds to a judge trying a jury case, with the additional power of going to the jury room. If the law member is not a lawyer, the court-martial resembles a trial by blue ribbon jury without a judge. In civil cases, such a trial is void.

In military law, the same is true. The Manual for Courts-Martial (1949) states (page 3):

"Failure to appoint a law member of a general court-martial who is qualified as prescribed in Article 8 renders any proceeding of such a court void."

Congress in its wisdom provided that the Judge Advocate General's Department shall bear the important responsibilities of law members of general courts-martial, in order that the men who are giving at least the best years of their lives to the nation will have the best in military justice and discipline.

The selection of judges is of the greatest importance in the administration of justice. The quality of the judiciary largely determines the effectiveness of the system.

With a qualified law member, a court-martial compares favorably with a typical civilian judge or jury, resembling in effect a blue ribbon judge and blue ribbon jury. Without a qualified law member, a general court-martial is

easily lost in the intricacies of law and criminal investigation. The qualified law member is the keystone of a sound court-martial system.

Congress in 1920 by this reform measure in the 8th Article of War undertook to establish a method for the selection of judges for the administration of military justice and discipline. Congress introduced system in place of confusion. The Judge Advocate General's Department was to constitute the judiciary of the Army general courts-martial. The law member was required to be a member of the Judge Advocate General's Department, with a single exception that will be discussed later in this brief. The Judge Advocate General's Department would determine in advance the uniform standards for the officers who would be members of that Department and thus eligible to serve in the judiciary of the Army as law members of general courts-martial. The selection of those eligible to be law members would be uniform and systematic, centralized in Washington, with the effectiveness that good personal administration can accomplish. The haphazard selection of law members from whatever officers happened to be in a particular command, some of whom might have had legal training or experience of one kind or another, was to be dispensed with. It was outmoded. On-the-spot selections at far-flung commands all over the world were gone with the wind of the horse and buggy days.

THE EXCEPTION IN THE STATUTE

The 8th Article of War contains an exception:

“ . . . except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member.”

The purpose of the exception is obvious. In battle emergencies, either casualties or illness among the officers of the Judge Advocate General's Department could prevent the holding of courts-martial if the presence of an officer of that department were an indispensable requirement.

But Congress did not intend that at the Headquarters of all the forces in Europe, nineteen months after the cessation of hostilities, a general court-martial should sit for six weeks trying among other cases capital felony charges without an officer of the Judge Advocate General's Department as law member. That would be NULLIFICATION of the reforms of the 1920 legislation.

THE STATUTORY EXCEPTION: ADMINISTRATIVE INTERPRETATION

Since the decision of the Court of Appeals in this case, it has come to light that the exception in the 8th Article of War has been given an interpretation that makes it refer to practically every general court-martial. Its growth has been like a cancer, distorting out of all proportion, and killing the reforms of the 8th Article of War.

In the Canal Zone, in a period of 32 months, not one law member was an officer of the JAGD.

Fugate v. Hiatt, 86 Federal Supp. 22 (7/15/49).

In the Philippines, in five months in 1945 under war conditions, with 15 officers of the JAGD stationed in the command, not once in 500 general courts-martial was the law member an officer of the JAGD.

Sinclair v. Hiatt, H.C. No. 2433 in the Northern District of Georgia, September, 1949.

On page 32 of the Warden's brief, note 12, it is stated that if the accused prevails, there must be a wholesale release of convicted Army personnel from confinement.

This confirms the conclusion that rarely was a law member an officer of the JAGD in the years prior to 1948.

The administrative interpretation of the statutory exception in regard to availability reached this absurd result. An officer of the JAGD was virtually never available, for he was always "busy with other things." Often he served as prosecuting attorney.

The rule that administrative rulings shall be given great weight must be abrogated when an administrative ruling becomes a NULLIFICATION of the laws of Congress.

Underlying this weird practice in regard to law members is a simple explanation—the hesitance of high military personnel to accept the leadership of an officer of lesser rank in regard to affairs within the scope of his professional knowledge and skill. A general on the sick list finds it difficult to take orders from a captain in the Medical Corps. A colonel or a major dislikes to defer to a law member who is a captain. This view of the profession of arms is traditional and understandable, but it must give way to the orders of Congress. In the last analysis, this case presents the fundamental issue of whether the professional soldier can shuffle off the control of Congress over the military establishment. Fundamental in the Constitution and the traditional government of the United States is the principle that the war power is vested in Congress. Congress enacts the Articles of War. Generals are bound to observe and respect the Articles of War, not to pursue the policy of NULLIFICATION. The power to legislate has not been conferred upon the Judge Advocate General.

If this administrative ruling by the Judge Advocate General is to be adopted, it opens the flood gates and says, any administrative ruling, however bizarre, will be swallowed by the judiciary.

The argument that this administrative interpretation is to be given great weight is demolished by reason of the fact that Congress overruled that interpretation when it came to public attention in World War II.

On June 24, 1948, the Selective Service Act Amendment, to be effective in this respect February 1, 1949, provided:

"The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: Provided, That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in Article 31 hereof and such other duties as the President may by regulations prescribe."

The rule that administrative interpretations are entitled to great weight should be subject to another caveat. Whenever the ruling of the administrative body adds to its power, or relaxes legislative controls upon its functioning, then the merits ought to be examined impartially.

The administrative interpretation of availability should therefore be considered with caution. Congress has rejected it. It is wrong. It does not deserve judicial adherence. NULLIFICATION is out of the question.

If it be urged that the number of prisoners affected is large, the answer is that if their cases resemble this, the number of innocent men, American soldiers, unjustly buried alive in prison is a consideration of great significance. Guilty murderers can be tried again.

(A) THE STATUTORY EXCEPTION: BURDEN OF PROOF.

The burden of proof in case of a statutory exception is upon the party relying upon it. The District Court and Court of Appeals so held in this case. In the case of *Walling v. Reid*, 139 Fed. 2d 323 (CCA 8-1943), the court said:

"One claiming the benefit of an exemption from a statute of general application has the burden of bringing himself clearly within it."

In *Vondermuhl v. Helvering*, 75 Fed. 2d 656 (CA DC 1943), the court said.

"One claiming the benefit of a statutory exception must bring himself explicitly within it."

In *Canadian Pacific Railway Co. v. U.S.*, 73 Fed. 2d 831, 834 (CCA 9-1934), the court said:

"A proviso or exception which restricts the general scope of the act must be strictly construed, and will not be permitted to take any case out of the enacting clause which does not clearly fall within its terms, and the burden of proof is on one claiming the benefit of the proviso."

In *U.S. v. Union Pacific R. R. Co.*, 20 Fed. Supp. 665, 667 (DC Idaho 1937), the court said:

"An exception in a statute is to be strictly construed and any one who claims to be relieved from its operation is required to establish that he comes within the words of the exception."

Ryan v. Carter, 93 U.S. 78, 83 (1876).

Thomas E. Basham Co. v. Lucas, 21 Fed. 2d 550 (Ky. D. C. 1927).

PROOF IN THIS CASE

The Warden introduced no evidence at the hearing (R. 50, 53). The Record of Trial by Court-Martial contains no mention of any reason why the law member was not selected from the Judge Advocate General's Department, no mention of any notice or attention paid to the requirements of the 8th Article of War, no indication that there was any attempt to exercise any discretion.

NO PRESUMPTION OF THE MAKING OF A DETERMINATION IN REGARD TO AVAILABILITY

The Warden contends that there is a presumption that the appointing authority exercised his discretion and decided that there was no officer of the Judge Advocate General's Department available and that for that reason he did not name one to the place.

The cases cited in the introduction to this point establish the principle that no such presumption exists, nor any inference.

Furthermore, a presumption must have a basis in probability, in factual likelihood. The facts above stated on pages 20 and 21 of this brief establish that there is no factual basis for such a presumption.

Indeed, the Warden contends that the mere fact that a court-martial had been appointed was itself irrebuttable proof that the appointing authority duly considered the question whether an officer of the Judge Advocate General's Department was available. If such a rule were adopted, it would be in effect a ruling that anything goes—that because a person doing an act is in an administrative position, he never errs and it can never be shown that he committed a human error of omission or commission.

Nothing in the 8th Article of War gives countenance to such a theory. On the contrary, it places limits on the appointing authority and does not give him a blank check signed by Congress.

Unless the 8th Article of War is enforced in this clear case, it becomes a dead letter by judicial veto.

NO EVIDENCE OF THE MAKING OF ANY DETERMINATION IN REGARD TO AVAILABILITY

The Warden offered no evidence.

The record contained no recital of the making of any determination in regard to availability, or that the question was ever considered, or that any discretion was exercised on the subject.

On the contrary, the record shows two Judge Advocate General Department Officers available, Captain Chalkley and Captain Sams. Captain Chalkley served as assistant trial judge advocate of this very court. That establishes that he was available. Captain Sams was at Continental Base Section Headquarters on the day of the order of reference for trial, in the command as assistant trial judge advocate.

OLD PRECEDENTS CITED BY WARDEN ARE TRIVIAL

In *Martin v. Mott*, 12 Wheat 19 (1827), and *Bishop v. United States*, 197 U.S. 334 (1905), the jurisdictional minimum membership was five, and was satisfied. The use of thirteen members upon a court-martial was not intended to be a jurisdictional requirement but merely discretionary. That is the obvious meaning of the language used in the statute there applicable. The mere point of numbers is of trivial importance in comparison with the significance of the qualifications of the principal member, the law mem-

ber. Nor was the statutory provision in the form of a statutory exception that would shift the burden of proof to the party claiming the benefit of the exception.

In *Mullan v. United States*, 140 U.S. 240 (1891), the issue was insufficient rank of members of the court-martial. The matter was trivial in comparison with the question of the qualifications of the most important member, the law member. Furthermore, the fleet was at Hong Kong and the officers were in Washington. Nor was there a statutory exception involved.

In *Swain v. United States*, 165 U.S. 553 (1897), the question was again the trivial one of comparative rank. Nor was a statutory exception involved.

The cases of *Martin v. Mott*, *supra*, and *Mullan v. United States*, *supra*, were decided before the right to collateral attack upon sentences of courts-martial had become firmly established.

No prejudice whatever resulted in any of those four cases. In the present case, the contrary is true.

That these four old cases cited by the Warden, and the more recent case of *Kahn v. Anderson*, 255 U.S. 1 (1921), do not apply, is the position now taken in the new Manual for Courts-Martial (1949), Section 4(e) on page 3:

"Failure to appoint a law member of a general Court-Martial who is qualified as proscribed in Article 8 renders any proceeding of such court void."

CONCERNING HENRY v. HODGES, 171 Fed. 2d 401 (CCA 2-1948).

This is the time to beware of "the power of a great name to perpetuate error." Judge Learned Hand wrote the unfortunate opinion, enlarging upon the meaning of "available," beyond its normal meaning.

The court overlooked the essential meaning of the plan established by Congress. Furthermore, it apparently did not have the information that the word "available" has been overworked to the point that an officer of the Judge Advocate General's Department is almost never "available." Judge Hand would not countenance such evasion. He would not allow an exception in the statute to grow in the manner of a cancer and distort the normal meaning of the exception.

In *Henry v. Hodges* the opinion points out the lack of evidence of availability in that case. In the present case, Captain Sams was available. (R. II, 22). He was not used in any capacity in the case, except to attest an oath. Captain Chalkley was also available (R. II, 53).

PREJUDICE SHOWN FROM LACK OF JAGD OFFICER AS LAW MEMBER

This is no technicality. Without a member of the Judge Advocate General's Department on the court-martial, it resembled a jury trial without a judge present.

A trained lawyer with professional experience was needed to sift and weigh the evidence, particularly to evaluate the autopsy and the *res gestae* statement and the prosecutor's failure to account for the bottle. This court-martial involved points of law that apparently were not considered: the justification of a sentry's duty, the rejection of the obsolete doctrine of "retreat to the wall," the significance of provocation that was adequate to limit the offense to manslaughter, even if it were not a complete justification.

Surely a trained lawyer would have noticed the statement of the sole eye-witness, Sergeant Olschewski, that it all happened so fast that he did not have time to notice whether or not Brown's breath had the odor of alcohol

(R. II, 61), and the uncontradicted testimony of Brown that he went for a flashlight, for it was dark where the wounded man lay, (R. II, 85), and the testimony of Stone that he and the accused carried the wounded man to his barracks (R. II, 70). Immediate aid to the injured is not normally rendered by a murderer.

The failure to have an officer of the Judge Advocate General's Department on the court-martial was probably a reason for the total breakdown of justice in this case.

JURISDICTION CANNOT BE CONFERRED BY CONSENT UPON A VOID COURT

The law member is the most important member of a court-martial. He has an importance corresponding to that of a judge presiding over a jury.

The qualification of the law member is not one to be waived. In *McClaghry v. Deming*, 186 U.S. 49 (1902) the court held:

"But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. His consent had no effect whatever in the face of the statute which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defend-

ant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial."

NO WAIVER OR CONSENT IN THIS CASE

The accused did not have knowledge that the law member was not an officer of the JAGD (R. 49). Without knowledge, he could not waive the disqualification.

Johnson v. Zerbst, 3040 S458 (1938):

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Gibbs v. Burke, 337 U.S. 773 (1949).

Uveges v. Pennsylvania, 335 U.S. 437 (1948).

An additional reason: the accused would not have been permitted to prove availability, according to page 29 of the Warden's brief.

LEGISLATIVE HISTORY

The Warden argues that knowledge of the cases of *Martin v. Mott*, 12 Wheat. 19 (1827), *Mullan v. U.S.*, 140 U.S. 240 (1891), *Swaim v. United States*, 165 U.S. 553 (1897) and *Bishop v. United States*, 197 U.S. 334 (1905), indicates that in 1920 Congress did not consider a defect in the constitution of a court-martial to be one of jurisdiction. Those cases were on trivial points altogether different from the qualification of the law member. Congress probably never thought of them in the same connection. The Manual for Courts-Martial (1949) considers them immaterial (page 3 of Manual).

The argument on page 21 of the Warden's brief concerning a proposed Act of 1920 falls flat and proves nothing.

ing. The same is true of the reference on page 22 to the phrase "for the purpose."

His argument on pages 23 and 24 about a proposed phrase "reasonably available" is weak and flat because it referred to a proposed provision for a defendant who enjoys special constitutional and statutory protection.

His argument on pages 25, 26 and 27 about the recent amendment of AW 8 is unconvincing and gives the opposite of the sound interpretation. The truth is that the practices followed pursuant to administrative interpretation were so shocking that Congress overruled the administrative error. NULLIFICATION of the 8th AW had never been intended by Congress.

His argument on pages 20 and 30 that a law member need not attend court-martial trials was overruled by Congress. Furthermore, there is a difference between absence and disqualification. A disqualified law member is worse than none. A disqualified law member may unintentionally confuse and mislead the other members of the court.

His brief on page 31 repeats an error appearing over and over again in his brief, his assertion that the appointive authority determined that no officer of the JAGD was available. Not one scintilla of evidence, not one entry in the court-martial record gives any indication that there was any such determination. Everything indicates that there was no such determination. The District Court found as a fact that there was no such determination. Unless plainly wrong, the finding of the District Court upon this fact must be affirmed.

The fact that there was no such determination appears on the face of the very order appointing the court. It also appears on the amended specification, an indispensable part of the record, as an indispensable part of that specification.

The single function of JAGD officers that Congress provided that they must perform is that of law members of a general court-martial. To give to "availability" the interpretation that has been given by the Warden's brief is to flout the positive order of Congress.

The Warden's brief on page 33 overlooks the principle that the burden of proof in regard to availability is on the Warden. It was not carried. He offered no evidence.

In *United States v. Cooke*, 336 U.S. 210 (1949):

"We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed services."

III

DUE PROCESS

The Fifth Amendment provides:

"... nor shall any person ... be deprived of life, liberty or property, without due process of law ..."

The Army Board of Review has held that the Fifth Amendment applies to Army Courts-Martial. See *Wade v. Hunter*, 72 Fed. Supp. 755 (1947).

Rear Admiral Colclough, when Judge Advocate General of the Navy, stated, "all the Amendments are applicable to persons in the land and naval forces, except so much of the Fifth and Sixth Amendments as relate to presentment or indictment of a grand jury and to trial by jury."

38 *Journal of Criminal Law* 200 (1947).

See *Wade v. Hunter*, 336 U.S. 684 (1949).

Grafton v. United States, 206 U.S. 333 (1907).

Beets v. Hunter, 75 Fed. Supp. 825 (1946).

Sanford v. Robbins, 115 Fed. 2d 435 (CCA 5-1940) cert. den. 312 U.S. 697.

Schuta v. King, 133 Fed. 2d 283 (CCA 8-1943).

U.S. v. Hiatt, 141 Fed. 2d 664 (CCA 3-1944).

Hicks v. Hiatt, 64 Fed. Supp. 238 (1946, per Biggs, J.).

Shapiro v. U.S., 69 Fed. Supp. 205 (Claims 1947).

See *Wrublewski v. McInerney*, 166 Fed. 2d 243 (CCA 9-1948).

See 33 *Virginia L. Rev.* 269 (Hon. Kenneth C. Royall).

Any intimation to the contrary in the Warden's brief, page 13, lines 3-5, is totally unauthorized.

Numerous authorities hold that habeas corpus is available when due process has been denied.

Ex parte Lange, 18 Wall. 163 (1873—double jeopardy).

In re Snow, 120 U.S. 274 (1887—double jeopardy).

In re Nielson, 131 U.S. 176 (1889—double jeopardy).

Counselman v. Hitchcock, 142 U.S. 547 (1892—self-incrimination).

Ex parte Wilson, 114 U.S. 417 (1885—requirement of indictment).

Ex parte Bain, 121 U. S. 1 (1887—requirement of indictment).

Callan v. Wilson, 127 U.S. 540 (1888—jury trial).

See *Frank v. Mangum*, 237 U.S. 309 (1915—due process).

Johnson v. Zerbst, 304 U.S. 458 (1938—right to counsel).

Smith v. O'Grady, 312 U.S. 329 (1942 — due process).

Williams v. Kaiser, 323 U.S. 471 (1945—due process).

Rice v. Olsen, 324 U.S. 271 (1945—due process).

Wade v. Mayo, 334 U.S. 672 (1948—due process).

Townsend v. Burke, 334 U.S. 708 (1948—due process).

Price v. Johnston, 334 U.S. 266 (1948 — due process).

This is true of the sentence of a court-martial.

See *Wade v. Hunter*, 336 U.S. 684 (1949).

Schuta v. King, 133 Fed. 2d 283 (1943).

United States ex rel Innes v. Hiatt, 141 Fed. Supp. 238 (Penn DC 1946).

See *Waite v. Overlaide*, 164 Fed. 2d 722 (CCA 7-1948).

See *Wrublewski v. McNery*, 166 2d 243 (CCA 9-1948).

See *Hicks v. Hiatt*, 64 Fed. Supp. 238 (Penn. DC 1946).

See *Shapiro v. United States*, 69 Fed. Supp. 205 (CT claims 1947).

In *Humphrey v. Smith*, 336 U.S. 695 (1949) this court stated:

“It is contended that the court-martial was without jurisdiction to try respondent. If so the court-martial exceeded its lawful authority and can be invalidated despite the limited powers of a court in habeas corpus proceedings.”

DENIAL OF DUE PROCESS IN THIS COURT-MARTIAL

Due process of law is fundamental fairness in the conduct of a case. Due process is denied if the proceeding shocks the conscience of the court.

This case presents a most shocking instance of a travesty upon what a court-martial must be.

Fundamental defects include:

(1) "ACCUSED WAS COMMITTED ON THE THEORY THAT ALTHOUGH HE WAS ON DUTY AS A SENTRY AT THE TIME OF THE ALLEGED OFFENSE, IT WAS INCUMBENT UPON HIM TO RETREAT FROM HIS POST OF DUTY."

A civilian public officer need not "retreat to the wall." He need not retreat at all. He is justified in shooting when an attack is made in his presence. The body guard for Justice Field was released upon habeas corpus even before trial upon charge of homicide.

In re Neagle, 135 U.S. 1 (1889).

A military sentry, doing his duty, shooting at an escaping prisoner, killing a bystander, was justified and therefore was released on habeas corpus before trial in a civilian court.

United States v. Lipsett, 156 Fed. 65 (1907-DC Michigan).

The *Manual for Courts-Martial* (1928) states (page 163):

"The general rule is that the acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority, and

such that a man of ordinary sense and understanding would know to be illegal. (Wharton on Homicide.)”

Even if the accused had not been a sentry, it was not incumbent upon him to retreat. The old “retreat to the wall” theory has been rejected in this court.

Beard v. United States, 158 U.S. 550, 564 (1895).

Rowe v. United States, 164 U.S. 546 (1896).

Brown v. United States, 296 U.S. 335 (1921—per Holmes, J.).

It shocks the sense of justice to see a case in which the two best defenses of the accused are not considered at all. Such a trial is not fairly conducted. Fundamental fairness has been grossly violated.

In *Bridges v. Wixon*, 326 U.S. 135, 156 (1945):

“the erroneous admission of evidence of such significance that without that evidence it was wholly speculative whether the finding against the prisoner would have been made, entitled the prisoner to release on habeas corpus.”

See *Gibbs v. Burke*, 337 U.S. 773 (1949).

The Warden's brief, page 37, contends that the 1928 *Manual for Courts-Martial* overrules three decisions of the Supreme Court in regard to the obsolete doctrine of “retreat to the wall.” Yet the review opinion in this very case undertook to cite civilian authority, choosing a nisi prius state case about a hundred years old in preference to three later decisions of the Supreme Court. It will also be noted that on the same page 163 of the *Manual*, the text authorities are twice cited. That would be superfluous if it did not mean that reference should be made to the authorities.

The failure to give the accused the benefit of these two applicable defenses was a denial of due process.

(2) "ACCUSED HAS BEEN CONVICTED OF MURDER ON EVIDENCE THAT DOES NOT MEASURE TO MALICE, PREMEDITATION OR DELIBERATION."

Kwock Jan Fat v. White, 253 U.S. 454 (1920):

"The decision must be after a hearing in good faith, however summary . . . and it must find adequate support in the evidence. *Zakonite v. Wolf*, 226 U.S. 272."

Interstate Commerce Commission v. Louisville & Nashville R. R., 227 U.S. 88, 91 (1913):

"A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our government. . . . Such authority . . . comes under the Constitution's condemnation of all arbitrary exercise of power."

Vajtauer v. Commissioner, 273 U.S. 103 (1927):

"Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus."

(a) The incident occurred so quickly that Olschewski did not have time to tell whether there was any odor of alcohol on the breath of the accused. (R. II, 61.)

(b) Before the affair, accused did not have the pistol with a cartridge in the chamber, nor was it on his person. (R. II, 84, line 8, R. II, 78.)

(c) An argument preceded the shot, according to the German girl, a witness for the prosecution. (R. II, 68, lines 3-10, 17-20 and 38-41.)

(d) After the shot, accused rendered help to the wounded man at once, sending for a flashlight (R. II, 35) and helping carry him to the Polish barracks (R. II, 70).

Immediate aid to the injured is not characteristic of a murderer.

(e) A single shot alone was fired. (R. II, 35.)

(f) The two prosecution witnesses were in direct conflict on the one fact that occurred in the presence of both of them: whether an argument proceeded the firing of the shot.

(g) In regard to whether Olschewski or Kowalsczyk touched the German girl, she was not asked that particular question. The nearest approach to it was this:

"Q. What did they do when they came into the house?

A. They said 'Hello.'

Q. Then what happened?

A. And then Brown said they should go out.

Q. What did they do?

A. They turned around.

Q. Did they leave the house?

A. No, not immediately.

Q. What did Brown do then?

A. I don't recall.

Q. Was Brown standing up or sitting down?

A. He was standing up.

Q. How long was it before the Poles left the house?

A. About two minutes—it all happened so quick."

(h) There was no evidence to account for the bottle, what fingerprints were on it, or who brought it to the guard box. This absence of evidence without more left the prosecution's case in gravest doubt, far stronger than a reasonable doubt.

(3) THE LAW MEMBER.

A high degree of competence as an officer of the Field Artillery does not constitute sufficient qualification for the

equally specialized and equally difficult task of law member at a murder trial involving intricate points of law and criminal investigation.

The law member:

- (1) Allowed the case to be considered without reference to the defense of the justification of a sentry;
- (2) Permitted the obsolete and rejected theory of "retreat to the wall" to be invoked without question;
- (3) Omitted consideration of provocation sufficient to reduce murder to manslaughter;
- (4) Made no point of the failure to investigate the whiskey bottle, the weapon of the deceased;
- (5) Failed to inquire adequately in regard to intoxication of the deceased;
- (6) Failed to inquire adequately about provocation.
- (7) Misunderstood the meaning of "leading question."
- (8) Ruled strangely in regard to recalling a witness.
- (9) See pages 27-8 of this brief.

4. "THERE WAS NO PRE-TRIAL INVESTIGATION WHATEVER UPON THE CHARGE OF MURDER."

The *Manual for Courts-Martial* (1949), Section 34(d), page 27, provides:

"If as a result of an investigation a more serious or essentially different offense is charged, he should direct a new investigation to afford the accused an opportunity to exercise the privileges offered him by 35a and Article 46b with respect to the new or different matters alleged."

Section 35a of the Manual is extensive. It includes among other things the right to question adverse witnesses.

Brown's company commander, his battalion commander, his group commander and the investigating officer recommended trial upon a charge and specification of man-

slaughter. That was a recommendation that he should not be tried upon a charge of murder. The charge and specification of manslaughter were marked out at Headquarters, Continental Base Section, 100 miles away, without any explanation or further investigation. This procedure did not comply with military procedure. It did not give Brown a chance to question adverse witnesses upon the subject of malice or premeditation or provocation reducing murder to manslaughter. That was a denial of due process of military law.

(5) "THE RECORD SHOWS THAT COUNSEL APPOINTED TO DEFEND THE ACCUSED WAS INCOMPETENT, GAVE NO PREPARATION TO THE CASE, AND SUBMITTED ONLY A TOKEN DEFENSE."

A high degree of competence as an Infantry officer does not constitute sufficient qualification for the equally specialized and equally difficult task of defense counsel at a murder trial involving intricate points of law and criminal investigation. The ablest lawyer would bungle a major operation in surgery.

Article of War 17, Manual for Courts-Martial, provides:

"The accused shall have the right to be represented before the Court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11."

From Paragraph 45b, *Manual for Courts-Martial* (1928):

"An officer, or other military person, acting as individual counsel for the accused * * * will guard the interests of the accused by all honorable and legitimate means known to the law. * * *

"Before the trial he will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence to such plea; his right to testify or to remain silent; his right to make a statement; his right to introduce evidence in extenuation; and, in an appropriate case, his right to plead the Statute of Limitations. These explanations will be regardless of the intentions of the accused as to testifying, making a statement or as to how he will plead.

"His preparation for trial shall include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, * * *

"Ample opportunity will be given him and the accused properly to prepare the defense including opportunities to interview each other and any other persons."

Due process requires that counsel be tendered in capital cases.

Carter v. Illinois, 329 U.S. 173, 174 (1946).

Powell v. Alabama, 287 U.S. 45, 71 (1932).

And in other criminal cases if circumstances indicate the need, as they did in this case:

Gibbs v. Burke, 337 U.S. 773 (1949).

Williams v. Kaiser, 323 U.S. 471 (1945).

Smith v. O'Grady, 312 U.S. 329 (1942).

Wade v. Mayo, 334 U.S. 672 (1948).

Hawk v. Olsen, 326 U.S. 271 (1945).

Townsend v. Burke, 334 U.S. 736 (1948).

See *Rice v. Olson*, 324 U.S. 786 (1945).

"*The Right of Counsel Today*," 43 Ill. Law Rev. 664-667. (November-December 1948.)

"*The Right of an Accused to the Assistance of Counsel.*"

John R. Snively, 32 Journal of the American Jurisprudence Society 111-114. (December 1948.)

Representation by counsel means effective representation.

Edwards v. State, 204 Ga. 384, 50 SE 2d 10 (1948).

Hawk v. Olsen, 326 U.S. 271 (1945).

Schuta v. King, 133 Fed. 2d 283 (CCA 8-1943).

Cert. Den. 322 U.S. 761.

McDonald v. Hudspeth, 41 Fed. Supp. 182 (D. C. Kan. 1941).

Powell v. Alabama, 287 U.S. 45 (1932).

Shapiro v. U.S. 69 Fed. Supp. 205 (Claims 1947).

Von Moltke v. Gillies, 322 U.S. 708 (1948).

See *Townsend v. Burke*, 334 U.S. 736, decided June 14, 1948.

See *Klapprott v. U.S.*, 335 U.S. 601, 336 U.S. 942 (1949).

Counsel in this court-martial trial:

(1) Failed to confer about the facts and law of case with the accused until 15 minutes before the trial began, though he had an earlier opportunity (R. 43).

(2) He failed to present any defense except self-defense, omitting (a) the defense of the duty of a military sentry, *U.S. v. Lipsett*, 156 Fed. 65 (1907), (b) the provocation of the insult to the German girl, (c) the justification of a public officer set forth in the case of *In re Neagle*, 135 U.S. 1 (1889) MCM 1928, page 163, (d) the departure from the old "retreat to the wall" theory by the more recent cases of

Brown v. U.S., 296 U.S. 335 (1921), *Beard v. U.S.*, 158 U.S. 550, 564 (1895), and *Rowe v. U.S.*, 164 U.S. 546 (1896), (e) the significance of the original statement of the remark of Sergeant Olschewski, "Boy is O.K." (R. II, 34), (f) the fact that the autopsy report confirmed the testimony of the accused, proving that the deceased was lunging forward when shot (R. II, 36), (g) mention of the fingerprints upon the bottle, which should have been investigated on the question of whether the deceased was swinging at Brown, (h) mention of the reputation of Sergeant Olschewski in regard to veracity, (i) mention of whether Sergeant Olschewski or the deceased had been drinking, (j) mention of the powder burns upon the uniform of the deceased, (k) mention of whether the Polish guards, especially these two, were violent, quarrelsome and hard to get along with, (l) mention of whether the German girl was molested by the deceased, (m) mention of whether she saw a blow struck upon the face of the accused, (n) mention of whether the military or German police had any information, (o) objection to the pretrial fatal defects and other irregularities, (p) mention of the source of the bottle (R. 48, 49).

(3) Defense counsel argued the case for about 5 minutes. This was a trial upon a charge of murder (R. 48, 49).

(4) Defense counsel consented to a stipulation in regard to the gunshot wound that, coupled with the uncontradictory testimony of Pfc. Oaks, that the bullet entered the right shoulder on the back side, was substantially less favorable to the accused than the autopsy report (R. II 76, 36).

(5) Apparently was not a lawyer. If it is held or

believed that defense was a lawyer, the result should be the same. The harm to the accused is just as great.

(6) His questioning of witnesses was quite inadequate (R. II 62, 67-68, 79, 87).

(7) He failed to present available evidence that Brown gave immediate aid to the wounded man (R. II 35).

6. "THE APPELLATE REVIEWS BY THE ARMY REVIEWING AUTHORITIES REVEAL A TOTAL MISCONCEPTION OF THE APPLICABLE LAW."

The review by the Staff Judge Advocate was adopted by the Board of Review and approved by the Judge Advocate General without comment.

The review failed to comment upon the defense of the duty of a sentry acting in good faith to carry out his responsibilities. It supported the result of the trial upon a discredited doctrine now obsolete and rejected in federal criminal law, the doctrine of "retreat to the wall." It failed to observe that there was no evidence whatever of malice or premeditation. It failed to comment upon the effect of provocation of a degree not sufficient to justify an act and yet enough to reduce the severity of the crime from murder to manslaughter.

If the Staff Judge Advocate had access to the Report of Pretrial Investigation, his review was particularly subject to objection in that it failed to notice the significant *res gestae* remark, "Boy is O.K.," in which Sergeant Olschewski apologized for the misconduct of the deceased (R. II 34).

When the reviews went so wide to the mark, the

analogy of *Bridges v. Wixon*, 326 U.S. 135 (1945) applies.

The reviewing authorities serve the function of prosecuting attorney, defense counsel and court. No brief or argument is submitted in behalf of either side. The responsibility upon the reviewing authorities is very great.

At the argument in the District Court, counsel for the Warden contended that at the court-martial the accused testified that he shot in self-defense, and therefore could not claim that he acted as a sentry performing his guard duties. That same theory seems to pervade the opinions of the reviewing authorities.

Many a time a soldier or officer of the law is placed in a position of imminent danger where the correct thing for him to do in performing his duties is precisely the same that he would do in defending himself. It is in fact his duty to defend himself, protect his post and preserve order.

Later, upon the witness stand, when confronted with a question, he may say that he acted in self-defense. That does not negative the fact that he was at the same instant and by the same act carrying out his duties as a soldier or officer of the law. Surely he is not to be deprived of the protection to which a soldier or officer of the law is entitled by law merely because he through honest mistake or haste does not present a complete self-analysis upon the witness stand. The prosecution and the reviewing authorities in taking their extreme position have gone off on a tangent. They have been unduly severe without sound reason. They cannot expect a witness to submit a complete panorama of his mind in reply to each rapid-fire question at the trial.

When several of the principal defenses are not noticed, there has been almost a total failure of counsel for the defense on review. Also there has been a total misconception of the case from a judicial viewpoint. Due process is surely lacking.

7. PRETRIAL INVESTIGATION A TRAVESTY.

(a) Decisive error in evaluating autopsy report. See statement of facts in this brief, *ante*.

(b) Decisive error in quoting "Boy is O.K." when Olschewski's statement was translated. *Ante*, page 8.

(c) Bottle not examined for fingerprints of deceased. Brown called this bottle to the attention of the investigator (R. II 35; R. 81, 82, 83, 84).

(d) The source of the bottle and who brought it to the guard box were not investigated.

(e) Whether the Polish guards had been drinking that Christmas day or evening was not investigated. It had a bearing on the events, the probabilities of occurrences, and the accuracy of Sgt. Olschewski as a witness (R. II 30-36).

(f) Veracity of Sgt. Olschewski, chief witness of prosecution, was not investigated (R. II 30-36).

See *Hicks v. Hiatt*, 64 Fed. Supp. 238 (1946).

An American, on guard duty alone in an enemy country at night in the presence of aliens, is entitled at least to have the veracity of the sole significant witness against him subjected to thorough examination.

(g) Whether Sgt. Olschewski and Private Kowalsczyk were violent or quarrelsome was not investigated. The solitary American on duty in the presence of aliens in an enemy country is entitled as a matter

of right to this precaution. He has not had the protection which military law is designed to afford.

(h) Autopsy did not include a test of the intoxication of the deceased. (R. II 36).

(i) Autopsy did not include examination of clothing of deceased for powder burns which would have confirmed Brown's statement of altercation at close quarters. (R. II 36).

(j) Several witnesses who came immediately to the scene were not questioned.

(k) German police, who are the first to interview Miss Rehm (R. II 62, 67), were not questioned.

(l) Military police who first took custody of Brown and to whom Olschewski first talked were not questioned (R. II 35) (80).

(m) There was no inquiry of Oaks why he said the soldier had been drinking, which soldier he meant. The deceased was a private, a soldier off duty Christmas night. Brown was a non-commissioned officer under whom Oaks was then serving. He must have referred to the deceased. If he referred to Brown, did he get the impression merely because Brown had picked up the empty whiskey bottle? Or was Brown dazed and mumbling at the sudden shock of having inflicted a wound?

(n) The investigation was conducted exclusively for the benefit of the prosecution.

(o) All interviews shockingly superficial. A "once-over lightly" in a capital felony charge.

(p) The Investigating Officer interviewed only Brown. The others he rubber-stamped. Who took the original statements does not appear from the record.

A rubber-stamp investigation is not due process of the law. In this case, it was demonstrably injurious and highly prejudicial.

URGENCY OF THOROUGH AND IMPARTIAL PRE-TRIAL INVESTIGATION

In a military establishment, no investigation can be conducted without permission from the commanding officer. Discipline would be subverted by unofficial investigations. In 1947 defense counsel was not appointed until the case was referred to a general court-martial for trial. The accused was in the custody of Military Police. From behind the bars he could not conduct any investigation.

Military justice follows the continental practice. There, the prosecuting attorney customarily makes his investigating file available to defense counsel in advance of trial. That system is the opposite of "trial by surprise." Court-martial is continental in name and in substance.

Humphrey v. Smith, 336 U.S. 695 (1949), did not foreclose the question of due process.

Due process in military law requires a thorough and impartial pretrial investigation. Without it, a court-martial is in grave danger of being like a house built upon the sands.

In addition to the highly prejudicial and indeed decisive failures of the pretrial investigation, set forth above on pages 45 to 47 of this brief, the following occurred:

(8) FAILURE TO ACCORD TO THE ACCUSED THE RIGHT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM DURING THE PRETRIAL INVESTIGATION.

This right was conferred by the 70th Article of War as it was in 1947, this provision now being in the 46th. This

right was not accorded to the accused. (R. 41.) Failure to tell him of his right was a defect of jurisdiction and a denial of due process of law.

Johnson v. Zerbst, 304 U.S. 458 (1938).

Recitals in the Report of Pretrial Investigation that he was accorded this right may be rebutted by proof.

Anthony v. Hunter, 71 Fed. Supp. 823 (D.C. Kansas 1947).

Von Moltke v. Gillies, 322 U.S. 708 (1948).

Haley v. State, 332 U.S. 596 (1948).

Marino v. Ragen, 332 U.S. 561, 564 (1947).

And again, after the charge was changed to murder, no opportunity was given to Brown to examine the witnesses. He could well have questioned them in regard to provocation or malice.

IV

THE REQUIREMENT OF COUNSEL FOR THE DEFENSE WAS NOT SUBSTANTIALLY COMPLIED WITH

(This point has been discussed under "due process." It also arises as an independent constitutional ground under the Sixth Amendment.)

V

CONVICTION FOR MURDER REQUIRES A THREE-FOURTHS VOTE

(43d Article of War, 10 USCA 1514.)

"Death Sentence; when lawful. No person shall, by general court-martial, be convicted of an offense for which death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these

articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote. (June 4, 1920, c. 227, sub-chapter II, § 1, 41 Stat. 795)"

This was a reform measure adopted in 1920.

The minimum sentence for murder is life imprisonment. When there is a conviction for murder, it automatically carries a life sentence unless by unanimous vote the death penalty is imposed. Since a life sentence follows automatically as the minimum punishment for murder, a three-fourths vote is required. This is true because it is provided, "nor sentence to suffer life imprisonment, not to confinement for more than ten years, except by the concurrence of three-fourths. . . ."

Otherwise, if in case of a conviction for murder there were a mere two-thirds vote upon the issue of guilt, followed by a three-fourths vote to impose a life sentence, that second vote would be an empty gesture. Already the accused has been doomed at least to life imprisonment, if he is once legally convicted of murder.

This is an entirely different question of law from that presented in *Stout v. Hancock*, 146 Fed. 2d 741 (CCA 4-1944), in which it was contended that unanimous vote was necessary to convict for rape. Since the death penalty was not mandatory, it was held that there was no requirement of a unanimous vote.

In *Stout v. Hancock*, there was a three-fourths vote recorded. For rape or murder the minimum punishment is life imprisonment.

It is true that the statute is peculiarly drawn. The true intention of Congress, however, is to require a three-fourths vote in any case where sentence of life imprisonment is a mandatory minimum.

This point is available in this court.

United States v. American Express Co., 265 U.S. 425 (1924).

Cochran v. M & M Transportation Co., 110 Fed. 2d 519.

See *Ross v. Commissioner*, 169 Fed. 2d 483, 492 note.

LeTulle v. Schofield, 308 U.S. 415 (1940).

What happened to Brown could happen to any other American absolutely innocent in his intentions, doing his duty as he sees it. Until his release by habeas corpus, he was a FORGOTTEN MAN. This is a strong, clear case for habeas corpus. There is no jurisdiction to disturb the judgment of the Court of Appeals.

Respectfully submitted,

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Appearing specially

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CERTIFICATE OF SERVICE

I, Walter G. Cooper, certify that the foregoing brief has been served upon petitioner by mailing five copies in an envelope, duly stamped, sealed and addressed to Honorable Philip B. Perlman, the Solicitor General, Department of Justice, Washington, District of Columbia, and by mailing one copy each to Francis X. Walker, Esquire, Acting Assistant Attorney General, Stanley M. Silverberg, Esquire, Special Assistant to the Attorney General, Robert S. Erdahl, Esquire, and Israel Convisser, Esquire, all at the Department of Justice, and that this mailing occurred on this the day of January, 1950.

Attorney for Eugene Preston Brown

APPENDIX

"Title 10 U.S.C.A. § 1542. 'Charges; action upon (article 70) Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

"No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon

which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had or the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him." As amended Aug. 20, 1937, c. 716, §2, 50 Stat. 724.

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In the Supreme Court of the United States

WILLIAM H. HIATT, WARDEN, PETITIONER

v.

EUGENE PRESTON BROWN, RESPONDENT

Originally No. 359

AT THE OCTOBER TERM, 1949

**RESPONDENT BROWN'S MOTION
FOR REHEARING (MARCH, 1950)**

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I.

At the court-martial trial, the decision in regard to guilt was by two-thirds vote. This was admitted by the Warden (R. 7 and 14, paragraph 58) and appeared on the face of the record of trial by court-martial (2 R. 96).

Since the minimum punishment for murder is life imprisonment, the conviction upon a charge of murder requires a three-fourths vote (Respondent Brown's brief, pages 48-50).

The argument to the contrary, set forth in the Warden's reply brief, page 10, is that after conviction for murder, the court considers separately the question of sentence and if it does not vote either unanimously for the death sentence or three-fourths for life imprisonment, then a second ballot in regard to sentence is taken, and if the deadlock is not broken on this second ballot, the court returns to the previous question of guilt or innocence and

according to the Warden's brief (page 10), "there is only one alternative open to the court—to revoke its finding of guilt of murder and find the accused either not guilty or guilty of a lesser included offense."

For example: unanimously a court votes an accused guilty. Upon the question of sentence, all except one vote for the death penalty. An additional ballot in regard to sentence again results with all but one voting for the death penalty. Then, despite the fact that all members have decided that the accused is guilty, they return to the question of guilt or innocence and find the accused not guilty of any offense, or guilty of the lesser offense of manslaughter.

A second example: two-thirds vote for conviction for rape or murder. Then, under the mistaken belief that this is sufficient, the court separately considers the sentence. All who voted to acquit consider that point already adjudicated and they vote for a life sentence. Some who voted to convict vote for a life sentence. The total votes for a life sentence amount to three-fourths. The theory of the Warden is that that suffices to impose a life sentence.

A third example: unanimously the court finds an accused guilty of murder. Upon the subsequent ballot in regard to sentence, half vote for death and half vote for life imprisonment. This deadlock in regard to sentence occurs again upon another ballot. Now, although all believe the accused guilty, the Warden contends that they must re-examine the question of guilt, and reach a finding of not guilty, or guilty of a lesser offense, manslaughter.

Unless at that time Congress had expressly provided for such amazing results, no administrative interpretation has weight enough to compel such absurdities.

The source of the confusion is the theory that a conviction for rape or murder does not automatically carry a life sentence when death is not unanimously agreed upon. That faulty premise may be expected to lead to absurd conclusions.

The true conclusion is attained by following the true premise: once a conviction for rape or murder has been lawfully made, life imprisonment is automatic unless death is unanimously voted. Therefore, the conviction for rape or murder is automatically at least a life sentence, and for conviction for rape or murder a three-fourths vote is required. This is the only interpretation that makes sense.

In *Stout v. Hancock*, 146 Fed. 2d 741 (CCA 4-1945), certiorari denied 325 U. S. 850 (1945), Judge Parker wrote (page 744): "Conviction and sentence are two separate steps in a court-martial proceeding (Winthrop's Military Law and Precedents, page 392); and after conviction has been voted in a prosecution for murder or rape, the only punishments permissible under the law are death and life imprisonment. The vote on punishment is but a choice between these two; and, unless there is a unanimous vote in favor of the death penalty, life imprisonment necessarily follows."

Since at least life imprisonment necessarily follows, a three-fourths vote is necessary for conviction. Incidentally, there was a three-fourths vote in *Stout v. Hancock*.

(The statute under interpretation has since been amended, apparently upon ex parte application of the Army.)

II.

The long line of authority that jurisdiction is lost when due process or the right to counsel is violated would be

overruled by the decision of March 13. *Frank v. Mangum*, 237 U. S. 309 (1915); *Johnson v. Zerbst*, 304 U. S. 438 (1938); *Bridges v. Wixon*, 326 U. S. 135 (1945); *Eagles v. United States*, 329 U. S. 304 (1946); *Von Moltke v. Gillies*, 332 U. S. 708 (1948); *Price v. Johnston*, 334 U. S. 266 (1948); *Wade v. Mayo*, 334 U. S. 672 (1948).

Due process and the right to counsel are therefore jurisdictional questions to be considered on habeas corpus. *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 227 U. S. 88, 91 (1913); *Kwock Jan Fat v. White*, 253 U. S. 454 (1920); and *Vajtauer v. Commissioner*, 273 U. S. 103 (1927); *Humphrey v. Smith*, 336 U. S. 695 (1949). See *Halsbury, The Laws of England*, Vol. 25, pages 90-91.

In re Grimley, 137 U. S. 147 (1890) and *Swain v. United States*, 165 U. S. 553 (1897) are obsolete.

In re Yamashita, 327 U. S. 1 (1946) expressly left open the present point; see pages 9 and 23.

In the courts, the constitutional rights of due process and the right to counsel are understood and respected. In administrative law, they are in greater danger of infringement. The danger increases in proportion to the size of the executive branch of government. Among administrative departments, the Army is the largest. And the speed of its procedure causes miscarriages of justice. Its court-martial system does not consider justice the sole criterion of decision. Discipline has great weight. 33 *Virginia Law Review* 274-276; 33 *American Bar Association Journal* 41, 286, 898, 899; 13 *Chicago Law Review* 500; 48 *Columbia Law Review* 221-224. When a prisoner has been committed to a civilian prison for a long term of years, considerations of discipline have been satisfied. Equality before the law requires equal treatment for him

and his cellmate, a civilian prisoner. Particularly because Brown is innocent of any crime, and was convicted by violations of due process and the right to counsel.

III.

What has been stated in ground 2 above also applies to the right to the assistance of counsel.

IV.

The decision in regard to the law member not being a member of the Judge Advocate General's Department assumes a principal point at issue: whether the general who appointed the court-martial considered the question of whether an officer of the Judge Advocate General's Department was available for the purpose of appointment as law member. There is not one scintilla of evidence that he did. The point could have been proved by affidavit under habeas corpus procedure. There is no presumption that the question of availability of a JAGD officer was considered. 9 *Wigmore on Evidence* (3d Ed) 488, section 2534. Nor is it probable that the very able counsel for the Warden overlooked this point. Over two months elapsed between the filing of the petition and the trial.

V.

Our point that a statute allowing an appeal by a custodian in a habeas corpus case is contrary to the Constitution was not decided. (Pages 14 and 15 of our brief.)

In *Ex parte Billings*, 46 Fed. Supp. 663 (D. C. Kansas 1942): "It is a writ which cannot be abrogated or its efficiency curtailed by legislative action. Its position is made secure by the provisions of Article 1, Section 9 of the Constitution."

In *Lunsford v. Hudspeth*, 126 Fed. 2d 653, 659 (CCA 10-1942): "Its function or use should not be construed or employed so narrowly as to defeat the salutary purpose it serves in our system of government."

See *Ochikubo v. Bonesteel*, 60 Fed. Supp. 916 (1945).
See *In re Yamashita*, 327 U. S. 1 (1946), at page 23.

Lord Halsbury, Lord Chancellor, in *Cox v. Hakes*, (1890) L. R. 15 App. Cas. 506, 527, 528: "The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom."

Respectfully submitted,

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I certify that this motion for rehearing
is presented in good faith and not for delay.

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